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APPENDIX

Supreme Court, U.S.
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Supreme Court of the United States

OCTOBER TERM, [redacted] 1969

No. [redacted]

13

WILLIAM L. MAXWELL,

Petitioner,

—v.—

O. E. BISHOP, Superintendent of
Arkansas State Penitentiary,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR CERTIORARI FILED OCTOBER 9, 1968
CERTIORARI GRANTED DECEMBER 16, 1968

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District Court Docket Entries

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7/21/66	Petition for Writ of Habeas Corpus with Exhibits 1-6 attached filed.
7/21/66	Petition for Stay of Execution
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8/26/66	Order Denying Petition for Writ of Habeas Corpus
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8/29/66	Application for Certificate of Probable Cause
8/29/66	Order Denying Application for Certificate of Probable Cause
8/31/66	Copy of Order of Court of Appeals denying application for certificate and Stay
2/23/67	Copy of Order of Court of Appeals granting application for certificate of probable cause, and directing that Notice of Appeal be filed
2/23/67	Notice of Appeal

[1]

IN THE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF ARKANSAS

PINE BLUFF DIVISION

No. PB 66 C-52

WILLIAM L. MAXWELL,

Petitioner,

—v.—

O. E. BISHOP, Superintendent of
Arkansas State Penitentiary,

Respondent.

Petition for Writ of Habeas Corpus

(Filed: July 21, 1966)

To The Honorable United States District Court for the Eastern District of Arkansas:

The petitioner, William L. Maxwell, respectfully shows:

1. The jurisdiction of this court is invoked pursuant to Title 28 U. S. C. §2241(3) and §1 of the 14th Amendment to the Constitution of the United States.

2. The petitioner is a citizen of the United States and resident of the State of Arkansas. He is a member of the Negro race.

[2] 3. The petitioner is unconstitutionally and illegally restrained of his liberty by being confined and detained in the Arkansas State Penitentiary at Tucker, Arkansas. The person restraining petitioner's liberty is the respondent, O. E. Bishop, Superintendent of the Arkansas State Penitentiary.

4. Petitioner is confined as aforesaid under a sentence of death by electrocution imposed by the Circuit Court of Garland County, Arkansas on April 5, 1962 as the consequence of petitioner's conviction by that court on March 21, 1962 of the crime of rape. Petitioner is scheduled to be electrocuted at the Arkansas State Penitentiary pursuant to this conviction and sentence on September 2, 1966.

5. Following his conviction and sentence, the following proceedings occurred:

(a) Petitioner appealed to the Supreme Court of Arkansas which affirmed his conviction (*Maxwell* v. *State*, 236 Ark. 694; 370 S. W. 2d 113 (1963)), denied his subsequent petition for rehearing and set the date of his execution for January 24, 1964;

(b) Without applying for certiorari to the United States Supreme Court, petitioner, on January 20, 1964, filed here a petition for writ of habeas corpus, later twice amended, which as amended alleged that his conviction had been obtained in violation of rights guaranteed by the Constitution of the United States in that: (i) he was illegally arrested and there was an unlawful search and seizure of his house and person; (ii) he was tried in a hostile and prejudicial atmosphere; (iii) there had been racial discrimination in the selection of the jury which tried him; (iv) Ark.

Stat. §41-3403 was unconstitutionally applied and enforced against him because he was a [3] Negro charged with the rape of a white woman in Arkansas, where, pursuant to a long-standing custom and practice, Negroes charged with raping white women are usually sentenced to death while white men charged with rape or Negro men charged with raping Negro women are not typically sentenced to death in violation of the equal protection and due process clauses of the 14th Amendment, and, (v) the imposition of the death penalty upon him was cruel and unusual punishment contrary to the 8th and 14th Amendments.

(c) On January 21, 1964, this court issued an Order to Show Cause why the writ should not issue as prayed and stayed the execution of petitioner's sentence. After a hearing on petitioner's amended petition, this court, on May 6, 1964, dismissed the petition (*Maxwell* v. *Stephens*, 229 F. Supp. 205) and vacated the stay of execution. On May 19, 1964, petitioner noticed his appeal from that dismissal and on the same day, this court granted a certificate of probable cause to the United State Court of Appeals for the Eighth Circuit and stayed petitioner's execution pending the appeal.

(d) On June 30, 1965, the Court of Appeals affirmed the decision of this court (*Maxwell* v. *Stephens*, 348 F. 2d 325) and on December 6, 1965 the United States Supreme Court denied certiorari (*Maxwell* v. *Stephens*, —— U. S. ——, 15 L. ed. 2d 353).

6. On June 30, 1966, the Governor of the State of Arkansas set a new execution date for petitioner of July 15, 1966 which on July 7, 1966 was stayed until September 2, 1966 by order of the Acting-Governor.

7. Petitioner respectfully shows that the judgment and sentence of death rendered against him by the Circuit Court of Garland County, Arkansas, was void and in violation of the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States because petitioner is [4] a Negro who was sentenced to death for the rape of a white woman in the State of Arkansas, which State, its subdivisions and instrumentalities, including juries and administrative officers and agents, through policy, practice, custom and usage arbitrarily and discriminatorily impose the death penalty against Negroes charged with and convicted of raping white women, but does not impose the death penalty against white men charged with and convicted of rape in circumstances identical to those of Negro defendants. In support of this allegation, petitioner further shows:

(a) Since the decision of the Court of Appeals for the Eighth Circuit in petitioner's previous habeas corpus proceeding, the Supreme Court of the United States has granted certiorari in the case of *Sims* v. *Georgia*, Misc., No. 918, Oct. Term, 1965, to decide the following question as stated at 34 U. S. Law Week 3429 (June 20, 1966):

> "Where a Negro defendant sentenced to death in Georgia for the rape of a white woman offers to prove that nineteen times as many Negroes as whites have been executed for rape in Georgia in an effort to show that racial discrimination violating the equal protection clause of the Fourteenth Amendment produced such a result, may this offer of proof be disallowed?" [1]

[1] The Eighth Circuit in its opinion affirming the dismissal of petitioner's previous application for the writ has indicated that such an offer of proof may not be rejected but that the evidence previously

[5] (b) Since the decision of the Court of Appeals for the Eighth Circuit in petitioner's previous habeas corpus proceeding, petitioner has come into the possession of newly-discovered evidence, not heretofore available and which could not by the exercise of reasonable diligence have been presented prior to this time, which demonstrates conclusively the validity of his contention that the State of Arkansas discriminates against Negroes in the application of the death penalty for rape. This evidence consists of the results of a survey of rape convictions during the period 1945-1965 in a representative sample of nineteen counties comprising more than 47% of the population of the State of Arkansas. The survey was conducted in the summer of 1965, as part of a study of the application of the death penalty for rape in eleven southern states. This comprehensive study required the work of 28 law students throughout the summer, the expenditure of more than $35,000 and numerous hours of consultative time by expert criminal lawyers, criminologists and statisticians. Petitioner, who is an indigent, could not have himself at any time during the prior proceedings in his cause conduct such a study.

The results of the survey for the State of Arkansas have been subjected to regular and methodical analysis consistent with the best available sociological and statistical techniques for evaluating such data. Its basic conclusions are shown in the document annexed to this petition as Exhibit I and incorporated herein by reference. At the hearing of this cause, petitioner will adduce expert testimony which

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adduced was insufficient. See 348 F. 2d 329-331. The United States Court of Appeals for the Fourth Circuit has also heard oral argument on this question; its decision is pending in *Moorer* v. *State of South Carolina*, No. 10,526 argued May 30, 1966.

will further elucidate the results of the survey and demonstrate that the imposition of the death penalty upon Negro defendants convicted of rape in the State of Arkansas occurs disproportionately [6] frequently by reason of their race alone, and for no other cause. The affidavit of Norman C. Amaker, Esq. annexed to this petition as Exhibit 2 shows more fully the circumstances under which and the times at which the data for this survey was collected and analyzed.[2]

On the basis of the survey petitioner alleges that Negro defendants convicted of rape are sentenced to death with disproportionate frequency as compared to white defendants in the State of Arkansas; that differences in the rates of conviction of Negroes and whites for the crime of rape do not account for the differential frequency of imposition of the death penalty; that no pertinent differences relating to the offenders, victims, circumstances of the offense, or circumstances of the trial and conviction of Negro and white defendants account for the differential imposition of the death penalty; and that Negro defendants and this petitioner, are sentenced to death by the State of Arkansas and its instrumentalities solely on the ground of race in violation of the Fourteenth Amendment to the Constitution of the United States.

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[2] The sources of data were primarily prison and court records and trial transcripts. In some instances, personal interviews were conducted and newspaper accounts consulted. The data was recorded on a 28 page schedule which is annexed as Exhibit 3.

[3] The State of Arkansas in its brief in this court stated:

"There is a dearth of information as to the circumstances of the 19 Negroes who have been electrocuted for the crime of rape. There is no evidence of the number of Caucasians and Negroes charged, the results of their trials, the circumstances of the crime or the character of the victim and the accused. The one

[7] 8. Since the decision of the Court of Appeals for the Eighth Circuit in petitioner's previous habeas corpus proceeding, decisions of the Supreme Court of the United States have established that the proceedings in which petitioner was convicted and sentenced to death violated the Fourteenth Amendment to the Constitution of the United States. In this case, petitioner ought to be allowed to show that his conviction and sentence were unconstitutional under the doctrines of these supervening decisions. In support of these contentions, petitioner further alleges:

(a) The sentence of death imposed upon petitioner was determined by a jury pursuant to Arkansas statutes §§41-3403 and 43-2153. Neither these statutes, nor any construction of them by the courts of the State of Arkansas, nor the trial judge's charge in petitioner's case, limited or directed in any way the unfettered discretion of the jury to choose between the sentence of life or death. The jury's choice was thus unregulated by legal principles of general application, was left to be determined by arbitrary and discriminatory considerations, and was in fact arbitrary and discriminatory in petitioner's case. The unconstitutionality of this practice is determined by the decision of the Supreme Court of the United States in *Giaccio* v. *Pennsylvania*, —— U. S. ——, 15 L. ed. 2d 447 (1966).

(b) The grand and petit juries which indicted and convicted petitioner were selected by the jury commissioners of Garland County from jury lists which revealed the race

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element totally ignored by petitioner is that in this particular crime, as in the case at bar, the defense of consent is paramount."

The analysis of the results of the Arkansas Capital Punishment Survey properly interpreted by oral testimony, supplies this "dearth of information" since the effect of the indicated factors is analyzed.

of jurors and were compiled in turn from racially designated poll tax books. The use of these lists constitutes a per se violation of the equal protection clause of the Fourteenth Amendment to the Constitution of the United States. In *Sims* v. *Georgia,* Misc. No. 918, Oct. [8] Term, 1965, the Supreme Court granted certiorari to determine the following question as stated at 34 U. S. Law Week 3429 (June 20, 1966):.

> "Is a conviction constitutional where: (a) local practice pursuant to state statute requires racially segregated tax books and county jurors are selected from such books;"

(c) On information and belief, petitioner at the time of his trial and sentence to death was mentally incompetent to be tried being by reason of mental disease and deficiency incapable of understanding the proceedings against him and assisting counsel in his defense. Petitioner was not afforded a hearing on his competency to stand trial. His trial, conviction and sentence under these circumstances denied him due process of law under the Fourteenth Amendment to the Constitution of the United States as construed in *Pate* v. *Robinson,* —— U. S. ——, 15 L. ed. 2d 815 (1966).

9. Petitioner was convicted and sentenced to death by a jury pursuant to Arkansas statutes §§41-3403 and 43-2153. These statutes require that the issues of guilt or innocence and of life or death sentence be determined by a jury simultaneously, after the jury has heard evidence on both issues in the same proceeding. This procedure denied petitioner due process of law under the Fourteenth Amendment to the Constitution of the United States because evidence per-

tinent to the question of penalty could not be presented without prejudicing the jury against the petitioner on the issue of guilt. Cf. *Jackson* v. *Denno*, 378 U. S. 368 (1964). Nor could petitioner exercise his constitutional right of allocution before the jury which sentenced him, without thereby waiving his privilege against self-incrimination held applicable to the states under the Fourteenth Amendment in *Malloy* v. *Hogan*, 378 U. S. 1 (1964).

[9] 10. On information and belief, petitioner is presently insane and lacks the power of understanding to appreciate the penalty being imposed upon him. His execution under these conditions constitutes cruel and unusual punishment in violation of the Eighth Amendment to the Constitution of the United States, as incorporated in the Fourteenth Amendment, and further denies him due process of law in that his execution is barbaric and without legitimate purpose.

In support of this contention, petitioner further alleges:

(a) On July 7, 1966, petitioner, through one of his attorneys, requested respondent via telephone to permit a competent psychiatrist to examine petitioner at the Arkansas State Penitentiary. Respondent refused petitioner's request stating that he would allow such an examination only pursuant to a court order.

(b) Thereafter, on Tuesday, July 13, petitioner's attorney renewed his request by mail. A copy of this letter is attached hereto as Exhibit 4. By letter received by petitioner's attorney on July 15, respondent again denied petitioner's request on the stated grounds. A copy of this letter is annexed as Exhibit 5.

(c) Subsequently, petitioner's attorney, George Howard, Jr., consulted by telephone with a judge of the Circuit Court of Garland County and in person with a judge of the Circuit Court of Jefferson County both of whom informed Mr. Howard that neither court had authority under Arkansas law to issue an order requiring respondent to permit a psychiatric examination of petitioner. The affidavit of Mr. Howard annexed hereto as Exhibit 6 and incorporated herein by reference, more fully describes the circumstances of his attempt to have petitioner examined.

[10] (d) Pursuant to Ark Stat. §43-2622, respondent, on a showing of probable cause to believe petitioner is insane, has discretionary authority to transfer petitioner to the Arkansas State Hospital for a mental examination. The inability to secure a psychiatric examination of petitioner prevents a showing of probable cause sufficient to satisfy the requirements of this statute and also prevents petitioner from demonstrating his present insanity—if such an examination would show that he is in fact now insane—and hence violates petitioner's rights under the due process clause of the Fourteenth Amendment. See *Pate* v. *Robinson, supra.*

11. Petitioner has exhausted every remedy available in the courts of Arkansas and the Supreme Court of the United States to test the unconstitutionality of his conviction and death sentence.

12. WHEREFORE, petitioner prays:

(a) That a writ of habeas corpus be directed to the respondent issued on his behalf so that the petitioner may be brought before this court;

(b) That respondent be required to appear and answer the allegations of this petition;

(c) That petitioner be accorded the opportunity for a full evidentiary hearing on his allegations;

(d) That after full and complete hearing, this court reverse petitioner's conviction and relieve petitioner of the unconstitutional detention, imprisonment and sentence of death;

(e) That petitioner's execution now scheduled for September 2, 1966 be stayed by order of this court;

[11] (f) That the court grant such other, further and alternative relief as is just and proper under the circumstances.

Respectfully submitted,

WILLIAM L. MAXWELL
Petitioner

GEORGE HOWARD, JR.
329½ Main Street
Pine Bluff, Arkansas

NORMAN C. AMAKER
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Philadelphia, Pa.

Attorneys for Petitioner

[18]

Response

(Filed: July 27, 1966)

For this response, respondent states:

I

Respondent admits the jurisdiction of the court.

II

Respondent admits that petitioner is a citizen of the United States and a resident of Arkansas and that he is a Negro.

III

Respondent admits having petitioner in his custody, said custody being pursuant to a valid court order. Respondent denies that petitioner is being unconstitutionally and illegally detained.

IV, V, VI

Respondent admits the allegations contained in paragraphs four, five, and six of the petition.

VII, VIII, IX, X

Respondent denies the allegations contained in paragraphs seven, eight, nine, and ten. Respondent states that these allegations were, or could have been, raised in the prior federal habeas corpus [19] proceedings. Respondent states that these allegations have been passed upon or have been waived by failure to present.

XI

Respondent admits that petitioner has exhausted every remedy available in the courts of Arkansas and the Supreme Court of the United States to test the unconstitutionality of his convictions and death sentences.

Respondent states that petitioner has also exhausted every remedy available in the courts of the United States, and that the case should be considered at an end.

XII

WHEREFORE, respondent asks that the petition be denied and petitioner be denied any relief.

Respectfully submitted,

BRUCE BENNETT
Attorney General

By: /s/ FLETCHER JACKSON
Fletcher Jackson
Assistant Attorney General
Justice Building
Little Rock, Arkansas

Attorneys for Respondent

[20]

Pre-Trial Conference Order

(Filed: August 5, 1966)

On this day a consolidated pre-trial conference was held in captioned cases. Luther Bailey, Petitioner in No. 46, appeared by Christopher C. Mercer, Jr. and E. V. Trimble, his regular attorneys; William L. Maxwell, Petitioner in No. 52, appeared by George Howard, Jr., his regular attorney; in addition Norman Amaker, Esq. of New York City appeared as additional counsel for both petitioners. Respondent appeared by Fletcher Jackson, Assistant Attorney General of the State of Arkansas. The following proceedings were had:

1. The Court first took up with counsel the Bailey case, No. 46. In that case the Court had previously directed that proceedings in line with the requirements of the Supreme Court of the United States in Jackson v. Denno, 378 U. S. 368, be had in the trial court, that is to say in the Circuit Court of Pulaski County, Arkansas. In the course of the discussion it developed that Bailey is seeking to raise in this proceeding certain questions which have not been presented by him to the State courts, and that consideration of those questions by those Courts may be had under the provisions of Criminal Procedure Rule 1 of the Supreme Court of Arkansas. Such being the case, and particularly [21] in view of the fact that a *Denno* determination must be made in the Circuit Court, this Court finds that the petition in No. 46 should be dismissed at this time without prejudice to future action after exhaustion of State court remedies under Rule 1, supra. An order to that effect will be entered.

2. Turning now to the Maxwell case, No. 52, it appears that Maxwell makes the following constitutional contentions:

a. That the Arkansas statute, Ark. Stats., §41-3403, which permits the death penalty to be assessed in cases of forcible rape has been applied in a racially discriminatory and unconstitutional manner to Negro men convicted of raping white women.

b. That the Arkansas statute, Ark. Stats., §43-2153, which permits a jury to determine by the exercise of its discretion and without specific guide lines whether a person convicted of a capital crime shall suffer death or life imprisonment is unconstitutional, and, further, that it is in any event unconstitutional for the death penalty to be imposed in a rape case.

c. That under Arkansas law in a prosecution for forcible rape the jury hears evidence which is simultaneously relevant to both guilt and punishment; that the defendant cannot take the stand to testify in mitigation of punishment without waiving his privilege against self incrimination; and that this situation amounts to a denial of procedural due process of law.

d. That racial discrimination was practiced in the selection of jurors by the Jury Commission of Garland County, Arkansas, in the Circuit Court of which County Maxwell was convicted.

e. That Maxwell was mentally incompetent to stand trial in the Circuit Court and is now laboring under such mental incompetency as to render it unconstitutional for the State [22] to put him to death.

Counsel for Maxwell are now cautioned that if they know of any other constitutional grounds on which his conviction and sentence may be subject to attack, they should advance those grounds in this proceeding since this Court would be most reluctant to consider in some subsequent proceeding any ground of attack which could have been raised in this proceeding.

3. No. 52 is now set for hearing on the merits to the Court at Little Rock at 10:00 A.M. on Monday, August 22, 1966. Respondent is directed to have Petitioner present at that time and place. It was agreed that the transcripts of Maxwell's trial in the Circuit Court and of his original habeas corpus proceedings before Judge Gordon E. Young of this Court will be available, and that either side may introduce in evidence such portions of those transcripts as it may see fit.

4. With regard to the claim that the Arkansas rape statute has been applied unconstitutionally, and with regard to the claim of discrimination in the selection of the jury, Maxwell will introduce oral testimony. Counsel for Respondent stated that he did not at the moment contemplate calling any witnesses.

Counsel for Maxwell indicated that he might want to call witnesses to testify as to Maxwell's alleged low mentality. The Court indicated that such testimony would probably not be received.

5. With respect to the claim that the Arkansas statute has been applied in an unconstitutional manner, will rely in part on the testimony of Dr. Marvin E. Wolfgang, a criminologist and statistician on the faculty of the Uni-

versity of Pennsylvania, and on certain studies and [23] a report made by Professor Wolfgang.

The studies and the report relate to 55 cases of forcible rape reported from 19 Arkansas counties during the period from 1945 through the summer of 1965. Basic data on those cases were gathered by law student field workers from various sources and were recorded on individual case schedules. Those schedules were later analyzed by Professor Wolfgang, and his conclusions are based thereon.

Naturally, Professor Wolfgang's conclusions depend for their validity on the validity and accuracy of the individual case schedules. It was agreed that counsel for Maxwell will make those schedules available for the inspection of counsel for Respondent not later than August 10 and will also furnish the names and addresses of the field workers who assembled the original data in Arkansas. Not later than August 15 counsel for Respondent will advise opposing counsel and the Court as to whether, to what extent, and on what grounds he questions any individual case schedule.

Subject to objections on the ground of relevancy and materiality, and subject to challenges to individual case schedules, Professor Wolfgang will be permitted to testify as an expert witness and to introduce his report as a summary exhibit reflecting and illustrating his opinions. Again subject to objections or challenges to individual schedules there will be no occasion for Petitioner to introduce the schedules in evidence or to prove the sources of the information reflected thereon or therein, or to call the individual field workers as witnesses.

[24] 6. It was agreed that between now and the date of hearing Respondent will make Petitioner available for a psychiatric examination at the University of Arkansas

Medical Center or some comparable institution, and that a report of such examination will be furnished to the Court on or before the date of hearing.

7. Counsel are directed to examine this order closely; any errors herein or omissions are to be called to the Court's attention within the next five days.

This the 5th day of August, 1966.

J. Smith Henley
United States District Judge

Memorandum Opinion of the District Court

IN THE
UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF ARKANSAS

PINE BLUFF DIVISION

PB-66-C-52

WILLIAM L. MAXWELL,

Petitioner,

—v.—

O. E. BISHOP, Superintendent of the Arkansas State Penitentiary,

Respondent.

This is a habeas corpus proceeding wherein petitioner, William L. Maxwell, attacks collaterally for the second time his 1962 conviction in the Circuit Court of Garland County, Arkansas, of the crime of forcible rape. The sentence imposed upon him was death, Ark. Stats. Ann., §41-3403.

Petitioner, a Negro man, was charged with raping a 35 year old, unmarried white woman on the night of November 3, 1961. He pleaded not guilty and was tried before a jury. During the trial and during subsequent proceedings in the State court petitioner was represented by capable counsel of his own choice. Following the pronouncement of sentence and entry of judgment by the Circuit Court, petitioner appealed to the Supreme Court of Arkansas where his con-

viction was affirmed. Maxwell v. State, 236 Ark. 694, 370 S. W. 2d 113.

Subsequently, in early 1964 shortly before his scheduled execution petitioner filed in this Court a petition for habeas corpus challenging his conviction and sentence on a number of federal constitutional grounds. The case was assigned to District Judge Gordon E. Young who held a full evidentiary hearing and filed a detailed memorandum opinion denying the petition. Maxwell v. Stephens, E. D. Ark., 229 F. Supp. 205. The Court of Appeals, one judge dissenting, affirmed. Maxwell v. Stephens, 8 Cir., 348 F. 2d 325. In late 1965 the Supreme Court of the United States denied certiorari. Maxwell v. Stephens, 382 U. S. 944.

In due course the Governor of Arkansas scheduled the execution of petitioner for late July 1966; however, the execution was stayed administratively until September 2. That stay is still in effect.

Instant petition was filed on July 21, 1966. On August 5 a pre-trial conference was held, and the case was set for hearing on the merits on August 22. That hearing has been held as scheduled. The Court has given careful consideration to the materials before it, including oral testimony and documentary evidence. This opinion incorporates the Court's findings of fact and conclusions of law.

In the petition now before the Court petitioner alleges certain things that he alleged in his initial habeas corpus action; some things that were alleged in that action are not alleged here;[1] and the present petition contains some allegations that did not appear in the original proceeding.

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[1] Contentions made in the original proceeding and not urged here are: that petitioner was the victim of an unlawful arrest; that there was an unlawful search of petitioner's person and home; that evidentiary material was unlawfully seized in the course of the searches; that petitioner was mistreated physically and that a

Petitioner now contends that racial discrimination was practiced in the selection of the petit jury which tried and convicted him;* that it is unconstitutional to put anyone to death for the crime of rape;* that certain Arkansas statutes to be mentioned dealing with the crime of rape and the punishment to be imposed therefor have been applied unconstitutionally to Negro men convicted of raping white women;* that certain Arkansas statutes dealing with the imposition of the death penalty and certain Arkansas trial procedures in capital cases amount to a denial of due process of law; that petitioner was mentally incompetent to stand trial in the State court, and that his mental condition is now such that it would be unconstitutional to put him to death.[2]

In his pleadings respondent denies that any of petitioner's contentions have merit and, in addition, pleads res judicata, that is to say, respondent asserts that all contentions made here were either raised or could have been raised in the original proceeding in this Court and should not now be considered.

As far as respondent's plea of res judicata is concerned, it is settled that the conventional rule that issues which were litigated or which could have been litigated in an

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confession was extorted from him; that petitioner was tried in a hostile atmosphere. All of those contentions were considered and rejected by Judge Young; not all of them were urged on appeal; those that were were rejected by a majority of the Court of Appeals. This Court considers that all of the contentions not brought forward into this proceeding have been abandoned or that their lack of merit has been established in the original collateral attack on the State court judgment.

[2] The asterisks appearing in text indicate that the contention marked by the asterisk was raised in the original habeas corpus case.

original proceeding will not be again examined in a subsequent proceeding between the same parties or their privies does not apply with strictness to habeas corpus proceedings in the federal courts. Whether a federal court will entertain a successive application for a writ of habeas corpus, and whether and to what extent such a court will consider in connection with a successive petition matters which were or could have been determined in the original proceeding are questions addressed to the sound discretion of the court. See 28 U. S. C. A., §2244; Sanders v. United States, 373 U. S. 1; Simcox v. Harris, 8 Cir., 324 F. 2d 377. Of course, the fact that a specific contention brought forward in a successive application has been considered and rejected in connection with an earlier application is a factor to be considered by the court to which the successive application is addressed.

In this connection the Court in its pre-trial conference order in this case cautioned counsel for petitioner that if they knew of any constitutional grounds for attack on his conviction which had not been raised, such grounds should be brought forward in this proceeding since the Court "would be most reluctant to consider in some subsequent proceeding any grounds of attack which could have been raised in this proceeding." No contentions other than those previously mentioned have been made.

Taking up first the attack on the make-up of the jury, petitioner's complaint is that the Garland County jury commissioners chose the members of the jury panel from tax records identifying poll tax payers by race. That is the same complaint about the jury which was made in the original habeas corpus case, and the record here is the same as the one before the Court in that case. The matter was considered thoroughly by Judge Young and by the Court of

Appeals and, as indicated, the argument was rejected. This Court sees no occasion to reexamine the question and is not persuaded to do so by the action of the Supreme Court in recently granting certiorari in the case of Sims v. Georgia, 384 U. S. 998, noted in 34 U. S. Law Week 3429.

The Court finds it convenient to consider next the contentions with respect to the mental condition of petitioner.

As to the mental condition of petitioner at this time, it was agreed following the pre-trial conference that petitioner would be examined by the staff of the Arkansas State Hospital for Nervous Diseases. The examination was made and petitioner was found to be without psychosis. He thus, in effect, had the benefit of the post-conviction examination contemplated by Ark. Stats. Ann., §43-2622. In addition, at the request of counsel for petitioner he was examined by Dr. William G. Rees, Professor of Psychiatry and head of the Department of Psychiatry at the University of Arkansas Medical Center. Dr. Rees also found petitioner to be without psychosis. Petitioner was present at the hearing and was observed by the Court; the Court noted no irrationality in petitioner's behavior, and petitioner gave no evidence of present mental incompetency. While the contention has not been abandoned formally, it has not been pressed, and the Court finds it to be without merit.

With respect to petitioner's mental incompetency in 1962 to stand trial for the offense allegedly committed in November 1961, the thrust of the argument seems to be not so much that petitioner was in fact mentally incompetent fo stand trial but rather that in the circumstances the Circuit Court was required to make a judicial determination of his competency, that no such determination was made, and that its absence voids the conviction. Pate v. Robinson, 383 U. S. 375; see also United States ex rel. Robinson v. Pate, 7 Cir., 345 F. 2d 691.

The facts in that case were that the defendant, Robinson, was tried to the court without a jury in Illinois on a charge of first degree murder; his defense was insanity, and his mental condition both at the time of the commission of the alleged offense and at the time of trial were directly in issue in the case. He had a long history of behavior indicating serious mental disease; that history was brought out by testimony in the course of the trial, and four witnesses testified that in their opinion defendant was insane. In the course of the trial the prosecuting attorney conceded that there was doubt as to the sanity of the defendant and suggested that a psychiatrist in the employ of Cook County be called as a witness. Notwithstanding the fact that a statute of Illinois provided that whenever the evidence raises a "bona fide doubt" as to a defendant's competency to stand trial, it is the duty of the judge on his own motion to impanel a jury to pass on the question,[3] the trial judge indicated that it was not necessary for the State to call the psychiatrist, did not impanel a jury to consider the question of Robinson's sanity, and found the defendant guilty without making any specific finding as to his competency to stand trial. Both the Court of Appeals and the Supreme Court held that this action amounted to a denial of due process of law.

The facts in this case are quite different from those in *Robinson.* As far as petitioner's mental competency is concerned, the transcript of the proceedings in the Circuit Court reflects the following:

On November 7, 1961, an information was filed by the Prosecuting Attorney charging petitioner with the crime of

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[3] Ill. Rev. Stat., c. 38, §104-2, referred to in the opinions of both the Supreme Court and of the Court of Appeals.

rape committed on November 3. On November 28, 1961, it having been made to appear to the Court that petitioner desired counsel and was without means to employ counsel, an order was entered appointing two members of the Hot Springs, Arkansas Bar to represent petitioner without charge. On November 30 those attorneys proceeding under the provisions of Ark. Stats. Ann., §§43-1301 et seq. filed a petition for an order committing petitioner to the State Hospital for observation and report;[4] on the same day the petition was granted and petitioner was committed for a period of not more than one month. Petitioner was delivered to the Hospital authorities on December 1, and the Hospital staff made its report on December 29.

The Hospital report, signed by Dr. E. W. Crow, the examining physician, and approved by Dr. George W. Jackson, the Hospital superintendent, contained a diagnosis of "without psychosis." The report recited that it was the opinion of the examining physician and of the joint psychiatric staff that petitioner "was not mentally ill, to the degree of legal irresponsibility at the time of this mental examination" and "was probably not mentally ill, to the degree of legal irresponsibility at the time of the alleged commission of his acts."[5]

On January 15, 1962, petitioner, still represented by his appointed attorneys, was arraigned and entered a plea of not guilty. No suggestion was made to the Circuit Judge that petitioner was not mentally competent to plead or to

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[4] The filing of such a petition is not an uncommon practice in Arkansas in cases involving sexual offenses even where there is no real question as to the sanity of the defendant; the request may be made as a precautionary measure or at least as a time gaining device.

[5] The language of the report tracks the language of the statute. See Trotter and Harris v. State, 237 Ark. 820, 822, 377 S.W. 2d 14, ...

stand trial. On February 5 the case was set for trial, but a telegram was received by the Prosecuting Attorney to the effect that Mr. Christopher C. Mercer, Jr., a Negro attorney of Little Rock, had been employed to represent petitioner; accordingly, the setting was cancelled, and the case was passed for the time being. On the same day Mr. Mercer moved for a continuance of the case. That motion was granted, and by agreement the case was set for trial on March 19. At this point in the proceedings petitioner's appointed counsel were permitted to withdraw from the case.

Prior to the trial the Circuit Court was not requested to hold any sanity hearing or to take any testimony as to the mental condition of the accused; insanity was not an issue at the trial. No question of petitioner's mental competency was raised in connection with his appeal to the Supreme Court of Arkansas nor in connection with the original habeas corpus proceeding which he filed in this Court.

Conceding that Pate v. Robinson, supra, emphasizes that it is a denial of due process of law to put a person to trial on a criminal charge when he lacks the mental competency to stand trial, this Court does not believe that that decision or any other decision makes it the constitutional duty of State trial judges to hold sanity hearings on their own motion simply because there has been a routine pre-trial psychiatric examination of the defendant resulting in a negative report.

Certainly, in connection with this successive application for habeas corpus this Court is not willing to hold that the absence of a sanity hearing in the State court deprived petitioner of any federally protected right. It must be remembered that at the trial of the case petitioner was represented by an attorney not only of his own choice but also

of his own race. Presumably, if petitioner had been unable to comprehend the nature of the proceedings, to understand the charges against him, or to communicate intelligently with his attorney relative to his defense, that inability would have manifested itself to counsel prior to or during the trial and counsel would have brought the matter to the trial court's attention.

After petitioner's conviction his attorney filed a long motion for a new trial attacking the conviction on 40 grounds; mental incompetency was not one of them.

In the course of the pre-trial conference in this case, which was attended by Mr. Mercer although he does not represent petitioner in this case, the question of petitioner's mental competency to stand trial was discussed to some extent and nothing was said which would indicate that there is any real basis for belief that petitioner was not mentally competent in 1962. Nor is there anything in the reports of the State Hospital Staff or of Dr. Rees, which would form the basis for such a belief. Petitioner may be of somewhat low mentality, but mere mental weakness is not the equivalent of mental incompetency to stand trial or to be held guilty of a crime.

Before discussing the remaining contentions of petitioner the Court considers it advisable in the interest of precision to make some general comments relative to sentencing procedures in the Arkansas courts.

In all non capital criminal cases, whether felonies or misdemeanors, which are tried to juries, the jury affirmatively fixes within statutory limits the punishment to be imposed. If the jury agrees that the defendant is guilty but is unable to agree on the punishment, it may, if it desires to do so, return the verdict of guilty and request the judge to fix the punishment.

In capital cases the procedure is somewhat different. Under the substantive criminal code of Arkansas the punishment, and the only punishment, provided for a capital offense, such as first degree murder or rape, is death by electrocution. However, by virtue of Act 187 of 1915, which now appears as Ark. Stats. Ann., §43-2153, a trial jury in a capital case has the right to render a "verdict of life imprisonment in the State penitentiary at hard labor" in lieu of the death penalty. But, if the defendant is found guilty and punishment is not assessed at life imprisonment, the legal penalty is automatically death.

It is thus not correct, strictly speaking, to say that Arkansas juries "impose the death penalty" on anyone. Rather, those juries have the right in a sense to exercise clemency toward particular defendants by assessing the penalty of life imprisonment at hard labor in a capital case.

The Arkansas statutes attacked by petitioner in general and in their application to Negro men convicted of raping white women are Ark. Stats., §41-3403 and §43-2153, read together.

The basic argument that it is unconstitutional to inflict the death penalty upon any person for the crime of rape presents a question of law only which has been ruled upon adversely to petitioner by Judge Young and by the Court of Appeals. A possible variant of that basic argument to the effect that it is unconstitutional to permit a jury of twelve people, with responsibility divided among them, to determine ultimately whether a person convicted of a capital crime shall suffer death or be imprisoned for life is likewise rejected by this Court. If a State can constitutionally impose the death penalty for a crime, this Court sees no constitutional objection to permitting a jury rather than a trial judge to decide whether that penalty shall be imposed

in a particular case. And in this connection it might be pointed out that the obvious purpose of section 43-2153 is to permit juries to extend a degree of mercy to defendants convicted of capital crimes, not to make the assessment of the death penalty easier or more likely.

The argument is made, however, that in any event it is a denial of due process to permit a jury to make its determination solely by the exercise of its collective discretion without standards or guide lines laid down in the statutes or judicial decisions, or in the instructions of the court.

It may be conceded that the Arkansas statutes dealing with rape and dealing with capital punishment do not purport to set up any standards by which the jury is to exercise its discretion in determining whether it should exercise the power conferred upon it by section 43-2153, and it will be assumed that no such standards are to be found in the reported decisions of the Supreme Court of Arkansas. Nor did the Circuit Court in its charge to the jury attempt to lay down any principles which should be applied in determining whether petitioner, if convicted, should be punished by life imprisonment rather than by death.*

The Court does not think, however, that it is constitutionally necessary for specific standards or guide lines to be laid down or brought to the attention of the jury. Whether a convicted rapist or murderer is to suffer death, on the one hand, or life imprisonment, on the other, remains under Arkansas procedure, within the discretion of the jury, to be exercised in the light of the judgment, common sense, and experience of the jurors. Jurors are presumed

* It does not appear that counsel for petitioner requested any instructions on the subject.

to be persons of good judgment and common sense. If they do not know, without being told that in determining whether clemency should be extended in a given case they should take into consideration all of the relevant facts and circumstances shown in evidence and should weigh aggravating circumstances, if any, against mitigating circumstances, if any, no useful purpose will be served by telling them.

On this phase of the case petitioner again relies on a very recent Supreme Court decision, Giaccio v. Pennsylvania, 382 U. S. 399. Again, his reliance is misplaced.

Giaccio involved a peculiar, 1868 statute of Pennsylvania which permitted a jury in a misdemeanor case to determine by its verdict whether a defendant acquitted on a misdemeanor charge might nonetheless be taxed with the costs of the prosecution. Giaccio was tried on a misdemeanor charge; the jury found him not guilty but taxed him with the costs. The statute itself prescribed no standards by reference to which the jury was to determine whether an acquitted defendant should be charged with costs. However, Pennsylvania decisions had established that costs were not to be charged against an acquitted defendant unless his conduct had been "'reprehensible in some respect,' 'improper,' outrageous to morality and justice,' or that his conduct was 'not reprehensible enough for a criminal conviction but sufficiently reprehensible to deserve an equal distribution of costs' or that though acquitted 'his innocence may have been doubtful.'" 382 U. S. at page 404. The jury was instructed "that it might place the costs of prosecution on the appellant though found not guilty of the crime charged if the jury found that 'he has been guilty of some misconduct less than the offense which is charged but nevertheless misconduct of some kind as a result of which he should be required to pay some penalty short of

conviction (and) . . . his misconduct has given rise to the prosecution.'" Ibid.

The trial court ultimately held the statute unconstitutional, but the State appellate courts disagreed. There was an appeal to the Supreme Court of the United States, and that Court held the statute unconstitutionally vague notwithstanding the construction which had been placed upon it by the courts of Pennsylvania. In concurring opinions Justices Stewart and Fortas thought it sufficient to say simply that it is unconstitutional to tax the costs of the prosecution against an acquitted defendant.

Evidently, the majority of the Court were not unmindful that it might be contended that the holding would be used to attack the practice prevailing in many States, including Arkansas, of permitting juries finding defendants guilty to fix the punishments within legal limits. And the Court expressly noted that it intended "to cast no doubt whatever on the constitutionality of (that) practice." 382 U. S. at page 405, f.n. 8.

It is true that in his concurring opinion Mr. Justice Stewart said (p. 405 of 382 U. S.):

> ". . . It seems to me that, despite the Court's disclaimer, much of the reasoning in its opinion serves to cast grave constitutional doubt upon the settled practice of many States to leave to the unguided discretion of a jury the nature and degree of punishment to be imposed upon a person convicted of a criminal offense. Though I have serious questions about the wisdom of that practice, its constitutionality is quite a different matter. . . ."

Whether the interpretation which Justice Stewart place upon the reasoning of the majority turns out to be accurate

remains to be seen; for the present at least this Court will accept the majority's disclaimer at face value. And, the Court thinks that the Arkansas practice, which has been described, falls within the terms of the disclaimer.

The contention which has been urged most seriously here, and which has been ably argued by Professor Amsterdam of the University of Pennsylvania Law School, who is of counsel in the case, is that Arkansas juries customarily apply Ark. Stats. Ann., §§41-3403 and 43-2153 in a racially discriminatory and unconstitutional manner to Negro men who have been convicted of raping white women so that a disproportionate number of such defendants receive the death penalty. And it is argued that it makes no difference that the sentence results from negative jury action in failing to assess punishment at life imprisonment rather than from affirmative jury action in voting the sentence of death.

The same contention was made in the State courts and, as indicated, was urged before Judge Young and before the Court of Appeals. In those proceedings petitioner sought to establish his thesis by the use of execution records of the State of Arkansas and by records of sentences imposed in rape cases over a period of time in Garland, Pulaski, and Jefferson Counties. The statistics which petitioner was able to produce in the earlier proceedings were not convincing to the Courts concerned.

In the instant case petitioner relies upon the results of a study made in 1965 by Professor Marvin Wolfgang, a well qualified sociologist and criminologist on the faculty of the University of Pennsylvania. Dr. Wolfgang, whose qualifications to testify as an expert are not questioned and are established, testified at the hearing, and a written report prepared by him, together with certain other rele-

vant documentary material, was received in evidence without objection.

The background facts of the Wolfgang study may be summarized as follows:

In early 1965 Dr. Wolfgang was engaged by the NAACP Legal Defense and Educational Fund, Inc. to make a study of rape convictions in a number of southern States, including Arkansas to prove or disprove the thesis that in those States the death penalty for rape is disproportionately imposed upon Negro men convicted of raping white women.

Dr. Wolfgang was apprised of the fact that the results of his study might well be used in litigation such as the instant case.

As far as Arkansas is concerned, Dr. Wolfgang caused Mr. John Monroe, a qualified statistician, to select a representative sample of Arkansas counties with reference to which the study would be made. The sample drawn by Mr. Monroe, who testified at the hearing, consisted of 19 counties in the State.

During the summer of 1965 law students interested in civil rights problems were sent into Arkansas to gather basic data with respect to all rape convictions in the sample counties for a period beginning January 1, 1945, and extending to the time of the investigation. Data obtained as to individual cases were recorded on individual case schedules. When the work was completed, the individual schedules were turned over to Dr. Wolfgang for evaluation.

The investigation brought to light 55 rape convictions during the study period involving 34 Negro men and 21 white men. The offenses fell into three categories, namely: rapes of white women by Negro men; rapes of Negro women by Negro men; and rapes of white women by white men.

No convictions of white men for raping Negro women were found.

Dr. Wolfgang found that of the 34 Negroes convicted of rape 10 had been sentenced to death and 24 had been sentenced to life imprisonment; the corresponding figures for the white offenders were 4 and 17. The witness did not consider that particular variation to be of great significance. But he did attach great significance to the fact that of the 19 Negroes convicted of raping white women 9, or nearly 50 percent, had been sentenced to death, whereas in other racial situations only 5 death sentences had been imposed, those 5 sentences representing only about 14 percent of the total sentences imposed in those situations.

Using recognized statistical procedures Dr. Wolfgang undertook to determine whether the differential in the imposition of the death sentence was due to some factor other than the association between Negro offender and white victim. He concluded, and the Court agrees, that the differential could not be due to the operation of the laws of chance.

The witness then proceeded to consider race in relation to certain variables appearing in rape cases,[*] and also to

[*] The figures just given relate to convictions and sentences imposed. Actually those figures involve some duplications of individuals. The overall record reflects that two Negroes were convicted twice of raping white victims and received the death sentence each time. One Negro was convicted twice of raping two Negro women and received a life sentence in each case. And two white men were each convicted twice of raping two white women; in each instance the original sentence imposed was life imprisonment, and the second sentence was death.

[†] Generally speaking, and subject to certain exceptions, the variables appear to the Court to be facts or circumstances which reasonably might be supposed to either aggravate or mitigate a given rape. Variables included, but were not limited to, such

consider sentences imposed in relation to such variables. He found that race had significant associations with certain variables but not with others, but he also found that in general the sentences imposed had nothing significant to do with the variables, other than the combination of Negro offenders and white victims.

Without stopping to go into further detail, the Court will state that it understands Dr. Wolfgang's conclusion to be that a Negro man who is convicted of raping a white woman has about a 50 percent chance of receiving a death sentence, regardless of the facts and circumstances surrounding the crime, whereas a man who is convicted of criminally assaulting a woman of his own race stands only about a 14 percent chance of receiving the death sentence.

Petitioner has made no effort here to show that the individual jury which tried and convicted him acted in his particular case with racial discrimination. Rather, petitioner urges that a showing of a pattern of racial discrimination in the imposition of the death penalty makes a prima facie showing of such discrimination in a particular case; that a failure of an Arkansas jury to assess punishment at life imprisonment in a capital case is tantamount to an assessment of the death penalty; and that it is unconstitutional for a jury to permit a death sentence to be imposed on a Negro man convicted of raping a white woman if it would have assessed a penalty of life imprisonment had the defendant been white and had he raped the same woman in the same or similar circumstances.

In appraising petitioner's contention and in weighing the testimony and report of Dr. Wolfgang the Court lays to

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factors as age of defendant, age of victim, degree of force, degree of injury, weapon use or display, and marital and family status of offender and victim.

one side the fact that in Sims v. Georgia, supra, the Supreme Court has agreed to review, among other things, the question of whether a Georgia trial court committed error in refusing to hear testimony to the effect that during a certain period in Georgia 19 times more Negroes than whites have received the death sentence in rape cases. In this case the Court has heard and considered all of the evidence which petitioner has offered.

While the statistical evidence produced in this case is more extensive and sophisticated than has been produced heretofore the Court is not convinced that it is sufficiently broad, accurate, or precise as to establish satisfactorily that Arkansas juries in general practice unconstitutional racial discrimination in rape cases involving Negro men and white women or to require or justify the inference that the Garland County jury which tried petitioner was motivated by racial discrimination when it failed to assess a punishment of life imprisonment.*

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*Garland County was not included in the sample group of counties considered by Dr. Wolfgang. Garland County statistics were before Judge Young in the original habeas corpus proceedings and were summarized in the opinion of the Court of Appeals. Maxwell v. Stephens, supra, 348 F. 2d at 330. Those figures revealed that in the ten year period beginning January 1, 1954, seven white men and three Negroes were charged with rape in that county. Two of the victims of the white men were white; the races of the other victims of those men were not disclosed. The victims of the Negro offenders were two Negro and one white woman. Charges against four of the white men were not pressed; the other three were convicted of lesser crimes. The charges against one of the Negroes was dismissed, and a second was convicted of a lesser offense. The third, petitioner here, was convicted of raping a white woman and received the death sentence. There is no question that the facts and circumstances surrounding his offense were such as to justify the imposition of that sentence entirely apart from any consideration of race.

The study does not indicate that Negro men convicted of raping white women invariably or even in a majority of cases receive the death penalty. The study covered only 55 cases over a twenty year period in 19 Arkansas counties containing, according to the census of 1960 47 percent of the State's population, and after making allowances for duplications it appears that only 7 Negro men were sentenced to die for raping white women. The cases studied, and the number of death sentences imposed are simply too few in number to afford convincing proof of the proposition urged by petitioner.

As to the sample which was considered, Dr. Wolfgang said in his report that the included counties "are a stratified random sample of Arkansas counties, geographically dispersed throughout the State and representative of the State in urban-rural and white-Negro population ratios." Although the sample drawn by Mr. Monroe seems to have been drawn in a manner which is acceptable statistically, the quoted statement of Dr. Wolfgang is simply not correct, and this was recognized by Mr. Monroe and is made clear by an examination of a map of the State attached to the report.

The Negro population of Arkansas is not distributed evenly over the State, nor is the State's overall population distributed evenly from the urban rural standpoint. An examination of the map which has been mentioned shows that the counties included in the sample are for the most part located in the southern and eastern portions of the State where the Negro population is heaviest and include most of the large urban centers in the State such as the Little Rock-North Little Rock metropolitan area, and the cities of Blytheville, El Dorado, Fort Smith, and Pine Bluff.

The variables which Dr. Wolfgang considered are objective; they are broad and in instances are imprecise. In connection with many of the cases studied the field workers were unable to obtain from available sources information which might have been quite pertinent, and Dr. Wolfgang's statistics really reveal very little about the details of the cases of the 7 individual Negroes who received the death sentence for raping white women as compared to the details of the cases in which other racial situations were involved.

Dr. Wolfgang himself recognizes in his report and in his testimony that his conclusions are subject to attack from certain angles due in large measure to the small number of cases studied and lack of available information in many of those cases. In his report he states frankly:

> "This report contains a preliminary analysis of data obtained in a study designed to determine the effect of racial factors upon capital sentencing for rape in the State of Arkansas. The preliminary analysis is neither exhaustive nor conclusive. Its findings presented below, are tentative and are based upon an exploratory investigation of the available data. Interpreting the results must be done with caution. Subject to this qualification, the preliminary analysis strongly suggests that racial discrimination is operative in the imposition of the death penalty for rape in Arkansas."

On the meager material before it the Court is simply not prepared to convict Arkansas juries of unconstitutional racial discrimination in rape cases. As a matter of fact the Court doubts that such discrimination, which is highly subjective matter, can be detected accurately by a statis-

final analysis can be made conclusive here. Statistics are elusive things at best, and it is a truism that almost any thing can be proved by them.

The Court does not intend to belittle either the study made by Dr. Wolfgang or his testimony. But the Court is perhaps not convinced by them any more than the Supreme Court of Arkansas, Judge Young, and the Court of Appeals were convinced by the materials previously submitted.

In his opinion Judge Young aptly stated that the issue of consistency always involved in rape cases. In cases not involving inter-racial situations the issue of consent may be and frequently is very real; that arises from a factual standpoint is much less likely to be present in cases in which white women have been attacked by Negro men. And the discrimination between death sentences imposed on Negro men convicted on inter-racial rape and such sentences imposed in other rape cases may well be explainable in large measure to the fact that in the former cases the trial jurors may have a firmer and more positive conviction of the truth of the charges than in cases of the latter type.

The final contention to be discussed does not involve any Arkansas statute but does involve Arkansas criminal procedure generally. Under that procedure the State puts on its evidence first and in many types of cases, including rape cases, evidence which is relevant to guilt is also relevant to punishment. When the State has completed its presentation, the defense may or may not introduce evidence, and the defendant may or may not testify in his own behalf. If he does testify, he waives his privilege against self-incrimination with respect to the charge against him, and may be cross-examined as fully as any other witness. The deliberations of the jury relate to both the

[illegible] and the question of punishment, there is no [illegible] before the jury as to the proper [illegible] which the defendant should receive.

Petitioner, who did not take the stand in the course of the trial in the Circuit Court, attacks as unconstitutional the procedure which has been outlined. He alleges that the procedure is unconstitutional because evidence pertinent to the question of guilt could not be presented without prejudicing the jury against the petitioner on the issue of guilt, and because he could not exercise his constitutional right of allocution before the jury which contemplates his [illegible] without thereby waiving his privilege against self incrimination.

In effect, petitioner contends that where a State leaves the matter of punishment to a jury's determination the Constitution requires that the issue of guilt or innocence first be tried out, and that if the defendant is found guilty, a separate hearing must be held before the jury on the question of punishment at the course of which hearing the defendant can testify as to mitigating circumstances without prejudice to himself since his guilt has been determined already.

While some States follow that procedure, this Court has held before that it is not constitutionally required. The Court does not consider this [illegible] [illegible] [illegible]

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

Appellant,	Appeal from the United States District Court for the Eastern District of Arkansas
Appellee.	

Circuit Judges

[redacted] an Arkansas prisoner [redacted] conviction for the [redacted] Ark Stat Ann § 41-3401 [redacted] a federal writ

[redacted] at the time of the offense and Maxwell's [redacted] and was replaced by [redacted] separates the crime of rape into [redacted] rape in the first degree is among [redacted] female by forcible compulsion [redacted] age conditions Section 41-2403 [redacted] conviction of rape a punishment [redacted] imprisonment also was by § 3 [redacted] and replaced The replacement [redacted] for sentences within prescribed [redacted] rape and for first degree [redacted] imprisonment If the offense [redacted] committed since the effective [redacted] rape in the first degree

of habeas corpus and, with its denial, a second time appeals. The points now urged to us are (1) that a prima facie case of racially discriminatory imposition of the death penalty for rape in Arkansas has now been established and remains unrebutted by the State; (2) that Arkansas' single verdict procedure is without appropriate standards, allows the jury to exercise its discretion irrationally, and is impermissible; and (3) that the decisions of the United States Supreme Court since Maxwell's first federal appeal demonstrate the error of our prior holding, adverse to the petitioner, on the jury selection issue.

We again review the background:

1. The offense for which Maxwell was charged was committed in the early morning of November 3, 1961, in the City of Hot Springs, Garland County, Arkansas. Maxwell, who was 21 at the time, was arrested within two hours after the offense was committed. His convicting jury did not "render a verdict of life imprisonment in the State penitentiary at hard labor", as it had the option to do [since 1915 (Acts 1915, No. 187, § 1, p. 774)] under §§ 43-2153 and 41-3403 and for which it had been given an alternate verdict form. Accordingly, and in line with the interpretation consistently given the statutes by the Supreme Court of Arkansas, *Kelley* v. *State*, 133 Ark. 261, 202 S.W. 49, 54 (1918); *Stewart* v. *State*, 233 Ark. 458, 345 S.W.2d 472, 475 (1961), cert. denied 368 U.S. 935, the trial court imposed the death sentence.

2 The petition itself also suggests, on information and belief, that Maxwell "is presently insane." At the hearing in the district court, defense counsel acknowledged that "[T]he report [from Dr. William G. Reese, Professor of Psychiatry and head of the Department of Psychiatry at the University of Arkansas Medical Center] states, in effect, that the petitioner is without psychosis. . . ." The defense's appellate brief recites that the insanity suggestion, "though dealt with by the district court, in its opinion, was not pressed below and is not relevant here".

2. Maxwell appealed. On this state appeal he challenged the sufficiency of the evidence; his prosecution by information; the constitutionality in application of the penalty statute, § 41-3403; the denial of his motion that his case be removed to federal court; the overruling of certain objections relating to voir dire; the overruling of objections as to latitude in his cross-examination of witnesses; the admission of evidence; the instructions; and aspects of the prosecution's argument to the jury. All these points were decided adversely to the defense and the judgment of conviction was affirmed by a unanimous Supreme Court of Arkansas (one justice not participating). *Maxwell v. State*, 236 Ark. 694, 370 S.W.2d 443 (1963). No petition for certiorari was filed with the Supreme Court of the United States.[5]

3. Maxwell, with new counsel, then filed a petition for a writ of habeas corpus in the United States District Court for the Eastern District of Arkansas. In that petition, as twice amended, he alleged the illegality of his arrest; impropriety of the search of his person; impropriety of the search of his home; mistreatment by the police; coerced confessions; an adverse and hostile trial atmosphere; racial discrimination in the selection of his jury; unconstitutional application of § 41-3403; and unconstitutionality of the death penalty for rape. Judge Young decided each point so raised adversely to the defense and denied the petition. His detailed opinion is reported as *Maxwell v. Stephens*, 229 F.Supp. 205 (E.D. Ark. 1964).

4. Judge Young, however, granted the certificate of probable cause required by 28 U.S.C. § 2253 and stayed execution. With additional counsel from New York, an appeal

[5] This fact, of course, no longer constitutes a failure to exhaust available state remedies. *Fay v. Noia*, 372 U.S. 391, 435-38 (1963). *Curtis v. Boeger*, 331 F.2d 615 (8 Cir. 1964).

was taken to this court. We noted that, except for an early pretrial proceeding, the state trial court appointed attorneys were in the case. Maxwell had been represented through all the state and federal proceedings to date, although different, non-court appointed counsel. The points primarily argued to us were three: (1) that Maxwell was denied due process and equal protection because he was sentenced under statutes which are discriminatorily enforced against Negroes; (2) that he was denied due process and equal protection because the Garland County jury lists revealed race and were compiled from racially designated poll tax books; and (3) that the taking of Maxwell's coat and reference to it in testimony at the trial violated his Fourth, Fifth and Fourteenth Amendment rights. In what we thought was an opinion meticulously concerned with the several issues raised by Maxwell, we reached the conclusion that Judge Young's decision was correct. *Maxwell v. Stephan*, 348 F.2d 325 (8th Cir. 1965). The late Judge Ridge dissented on the search and seizure issue concerning the coat but agreed with all the other conclusions arrived at by the majority.

With still another name added to the list of Maxwell counsel, a petition for certiorari was filed. The writ was denied, with Mr. Justice Douglas being of the opinion that certiorari should be granted. 382 U.S. 944 (1965).

Execution was rescheduled but was stayed administratively until September 2, 1965.

Maxwell's second and present petition for a federal writ of habeas corpus was filed July 21, 1965 in the United States District Court for the Eastern District of Arkansas and came before Chief Judge Henley. The court denied the petition. *Maxwell v. Stephan*, 251 F. Supp. 110 (E.D. Ark. 1966).

this court's disposition of Maxwell's first habeas appeal. It is said, in the words of the petition:

> "This evidence consists of the results of a survey of rape convictions during the period 1945-1965 in a representative sample of nineteen counties comprising more than 47% of the population of the State of Arkansas. The survey was conducted in the summer of 1965, as part of a study of the application of the death penalty for rape in eleven southern states. This comprehensive study required the work of 28 law students throughout the summer, the expenditure of more than $35,000 and numerous hours of consultative time by expert criminal lawyers, criminologists and statisticians. Petitioner, who is an indigent, could not have himself at any time during the prior proceedings in his cause conducted such a study."

The record and the evidence. At a pretrial conference the district court was advised that the evidence to be presented on behalf of Maxwell was that which resulted from the survey and study so described,[4] and that it would be presented through the testimony of Marvin Wolfgang, a criminologist statistician on the faculty of the University of Pennsylvania. It was agreed in pretrial that the survey's individual case schedules would be made available for inspection by counsel for the State. The court ruled that, subject to objections as to relevancy and materiality, Professor Wolfgang would be permitted to testify as an expert and to introduce his report as a summary exhibit. The State filed no objection to any of the individual case schedules. At the ensuing hearing the State agreed that the basic facts of the schedules, "that is, the age of the victim, the race, and so on, of the individual defendants, or the alleged victims", would stand admitted. Dr. Wolfgang then was called as a witness.

4 The study is said to be the same one with which the Fourth Circuit was concerned in *Moore v. South Carolina*, 368 F.2d 458 (4 Cir. 1966).

Dr. Wolfgang possesses the degree of Doctor of Philosophy in Sociology, with Criminology as a sub-field. He is Professor and graduate chairman of the Department of Sociology at the University of Pennsylvania. He is co-director of the Department's Criminological Center. He obviously is a man of scholastic achievement and of experience in his field. The State concedes that his "qualifications as a criminologist have never been questioned by the respondent".

The witness testified that in 1965 he was asked to participate in a study on capital punishment for rape and that this was suggested "as an appropriate topic for research analysis because of the underlying assumption that there is differential imposition of the death penalty in rape cases in certain states". This was to be "an effort to collect the appropriate kind of data necessary to provide some kind of empirical study, either in support of, or in rejection of, the underlying assumption. The ultimate objective of the study was to give the empirical data the appropriate kind of statistical analysis that would satisfy scientific requirements". He was informed that the result might be used in litigation on behalf of defendants who had been convicted and sentenced to death for rape.

The study was carried out in twelve states. One of these was Arkansas. For the State of Arkansas the period investigated was that from January 1, 1945, to the summer of 1965. Not every Arkansas rape case during that period was included but every case which occurred in the sample counties was included.

The study produced 55 rape convictions in the 19 selected Arkansas counties. The witness prepared a preliminary analysis of the data contained in the schedules the student investigators prepared for these cases. Among

the variables considered were race of the defendant, race of the victim, and sentence. The approach was to develop a "null hypothesis" that there is no difference in the distribution of the sentence of death or life imprisonment imposed on negro and white defendants, the calculation of a theoretical frequency which represents the number of defendants expected to be sentenced to death if the null hypothesis is valid, the comparison of this theoretical frequency with the actual frequency in the collected data for each defendant victim racial combination, and the determination whether the discrepancy between the expected and the observed frequencies is great enough so that, under accepted statistical standards, that discrepancy can be said to be a product of the real phenomena tested rather than of the operation of chance within the testing process. "If that difference reaches a sufficiently high proportion, . . . then the assertion can be made that the difference is significant and could not have occurred by chance".

The data gathering was not limited to the facts of race and sentence. It included other items such as the defendant's age, family status, occupation, and prior criminal record; the victim's age, family status, occupation, husband's occupation, and reputation for chastity; aspects of the prior relationship, if any, between the defendant and the victim; the circumstances of the offense such as the number of offenders and victims, the place, the degree of threat or violence, and the injury inflicted; other offenses contemporaneously committed; the presence of third persons and threats or injury to them; the nature of the intercourse; the involvement of alcohol or drugs; and the circumstances of the trial and post trial proceedings. Data of this general kind were included because they were felt to be relevant to the imposition of the type of sen-

[illegible] and [illegible] rather than race alone, may play a more important role in the disproportionate sentencing to death of Negro defendants convicted of killing white victims." The authors conceded that some data potentially pertinent were not collected so, for example, that "with respect to the strength of the prosecution's case, for we had no information of that sort that we could objectively collect."

The study disclosed that, in the 55 Arkansas cases, 34 defendants were Negroes and 21 were whites; that 23 had a previous record; that 20 were known to have been in prison; that 47 victims were whites, 10 were Negroes, and the race of one was unknown; that of the victims, two had prior criminal records and 51 did not; that 10 victims had a good reputation for chastity and 4 had; that 14 received the death sentence and 41 life; that counsel was appointed in 49 cases and retained in 6; that in 20 cases the offender was known by the victim and in 28 he was unknown; that the offender and the victim had had prior sexual relations in 4 cases; and that in 13 cases a threat of cruelty was entered.

Upon this Virginia data and the study in California concluded:

> 1. Factors not significantly associated with either the defendant's race or with the sentence were the place of pilleage, nature of entry, plea, type of counsel, duration of trial, seriousness of injury to the victim, type of prior relationship between defendant and victim, the defendant's previous record, and the number of living dependent children.
>
> 2. Factors not significantly associated with the defendant's race were the commission of a contemporaneous offense and previous imprisonment.

3. Factors not significantly associated with the sentence were the defendant's marital status, his age, the victim's age, the display of a weapon, and the defendant's having dependent children.

4. Factors which were significantly associated with sentence were commission of a contemporaneous offense and previous imprisonment.

5. Factors which were significantly associated with the defendant's race were marital status (a greater percentage of Negroes than whites were not married), display of a weapon (more Negroes than white used one), the defendant's age (more Negroes were young), the victim's age (the defendants were white more frequently in the older-defendant-younger-victim combination), and the existence of children dependent on the defendant (more whites had them).

6. An anlaysis of significant association with defendant's race or the sentence was either unnecessary or not possible with respect to the victim's prior record, her reputation for chastity, the force employed, her pregnancy by the offense, prior sexual relations between the defendant and the victim, and the defendant's assertion of the defense of insanity.

The study covered other items, too, but the analysis was confined to "those particular items in which there was sufficient information to display statistically and to treat statistically".

The witness then further concluded (1) that the critical variables were race of the offender, race of his victim, and sentence; (2) compared to other rape defendants, Negroes convicted of raping white victims were disproportionately sentenced to death; and (3) "no variable of which analysis was possible could account for the observed disproportionate frequency".

On cross-examination Dr. Wolfgang stated that the Arkansas report was "preliminary" in the sense that the

other states for which data was being collected would be included in the final report; that the 55 Arkansas cases did include some new trials; that, however, he did not think this disturbed his analysis; that he was only "very little" familiar with Arkansas geography; that he was "gratified the report is as good as it is"; that he used such variables as he could get information on; that if he had had more information, he could have used other variables and his report, accordingly, would have been more extensive; that reputation for chastity was presumed to be of some relevance but "unfortunately, there was not enough information upon which to make the analysis complete"; that as a criminologist he was willing to say "that an analysis of a social system—in this case, the judicial system—operated relative to the decision making regarding rape, is such that it casts considerable doubt upon the quality of justice in those particular cases throughout the system"; and that he has never sat on a jury but has been around them.

It was then agreed that among the 55 schedules there were 4 cases which concerned defendants convicted twice for the same rape as a result of a second trial. A fifth case was not one of repeated convictions but, instead concerned two victims.

Received in evidence was an exhibit prepared by the United States Bureau of Prisons. This showed that, for the years 1930-62, 446 persons were executed under civil authority in the United States for rape and that, of these, only 45 were white but 399 were Negro and 2 were of other races, and that, for the same period, 3,298 were executed for murder and, of these, 1,640 were white, 1,619 were Negro, and 39 were of other races.

The petitioner's second and only other witness was John Monroe, a Philadelphia statistician with 17 years'

experience in sampling and surveys. He testified that he was asked by Dr. Wolfgang to design a representative sampling of counties in 12 southern states so that inferences could be drawn for each state and for the region as a whole. Arkansas was included. The 1960 negro population was used as the measure. The sample size was determined largely on speculation as to what area the law students could cover in the time available to them. Nineteen Arkansas counties were selected. These contained more than 47% of the state's population. Mr. Monroe stated that his sample of Arkansas counties was a very reliable one under the restriction, that is, the number of counties that could be investigated during the time allotted. He went on to say that, so far as the sample is concerned, the inferences drawn from it were valid for Arkansas. Garland County was not one of those selected. This was because "the random number just didn't happen to fall in the population for Garland County". Had that county possessed more than 19,000 negro population it would have been selected. The witness conceded that he was sampling the negro population and not the entire population. This was because of the purpose of the study and, in order to compare negro and white cases, the sample has to provide enough of the former to make the findings valid.

The witness stated that he took the total negro population of Arkansas and divided it by the number of draws allocated to the State. This number turned out to be approximately 19,400. A random number between it and zero was selected. As adjacent county negro population added up to the random number plus 19,400, the county was selected. In this way, counties having more than 19,400 Negroes, or approximately that number, were taken consecutively.

On cross-examination it was pointed out that this method did not result in having the selected counties geographically disbursed throughout the State. Instead, the selected counties for the most part were in the east and south. This is where Arkansas' negro population is primarily located.

The court inquired what there was about the survey that gave it validity in Garland County. The answer was that the inferences drawn from the sample were valid for the State of Arkansas. Counsel then observed that it was not Garland County that convicted Maxwell and sentenced him to death but the State, and that the purpose of Mr. Monroe's testimony was to show that the counties selected were representative of the State.

On further cross-examination, the witness acknowledged that the northwestern part of the State was essentially the white population area, that the southeastern portion was the negro population area, and that Garland County was in the white area.

The State offered no evidence.

Such is the record. It is apparent from a reading of the record that the trial court was generous in its rulings on admissibility. Everything which the petitioner presented came in.

The trial court's conclusions on the statistical argument. Chief Judge Henley, in his opinion, pp. 717-21 of 257 F.Supp., described the statistical argument as the "contention which has been urged most seriously here". He referred to Professor Wolfgang as "a well qualified sociologist and criminologist" and to Mr. Monroe as "a qualified statistician". He observed that the investigation showed three categories, namely, rapes of white women

by negro men, rapes of negro women by negro men, and rapes of white women by white men, and that there was no conviction of a white man for rape of a negro woman. He noted that Dr. Wolfgang "concluded, and the Court agrees, that the differential could not be due to the operation of the laws of chance". He characterized Dr. Wolfgang's conclusions "to be that a Negro man who is convicted of raping a white woman has about a 50 percent chance of receiving a death sentence, regardless of the facts and circumstances surrounding the crime, whereas a man who is convicted of criminally assaulting a woman of his own race stands about only a 14 percent chance of receiving the death sentence". He acknowledged that "the statistical evidence produced in this case is more extensive and sophisticated than has been produced heretofore". Yet he was not convinced that "it is sufficiently broad, accurate, or precise as to establish satisfactorily that Arkansas juries in general practice unconstitutional racial discrimination in rape cases involving Negro men and white women. . . . The study does not indicate that Negro men convicted of raping white women invariably or even in the majority of cases receive the death penalty. . . . Only 7 Negro men were sentenced to die for raping white women. The case studies, and the number of death sentences imposed are simply too few in number to afford convincing proof of the proposition urged by petitioner". It is not correct, as Dr. Wolfgang said in his report, that the selected Arkansas counties are "representative of the state in urban-rural and white-Negro population ratios". The statistics "really reveal very little about the details of the cases" where the death sentence was imposed upon Negroes for raping white women as compared with other racial situations. "On the meager material before it the Court is simply not prepared to convict Arkansas juries of unconstitutional racial discrimination in rape cases". The

court went on to observe that "In cases not involving inter-racial situations the issue of consent may be and frequently is very real", but that that issue "is much less likely to be present in cases in which white women have been attacked by Negro men".

The petitioner's argument. The petitioner appellant characterizes the present proceeding as one presenting "for the first time in any appellate court . . . a record which is the end product of a detailed and exhaustive examination of the practical consequences of the procedures used in making the decision whether a man should live or die". It is stated that the question in this record is one of proof, namely, whether the petitioner has made a sufficient showing of racially discriminatory capital sentencing under Arkansas rape statutes. It is pointed out that on three previous occasions, namely, in the Supreme Court of Arkansas, before Judge Young, and in this court, the answer has been in the negative, "notwithstanding that on each successive occasion the evidence tended in the direction of more depth and completeness". This demonstrates, it is said, "how difficult it is for Negro litigants generally and those without means particularly, to make courts see 'the reality of the world, indeed . . . the segregated world' [citing *Brooks* v. *Beto*, 366 F.2d 1, 12 (5 Cir. 1966), cert. denied 386 U.S. 975] . . . in which they live . . . the law [needs to] 'see what all others see' ".

The heart of the petitioner's statistical argument is then forthcoming. It is that on this record the petitioner has made a prima facie case of racial discrimination in sentencing and that he is entitled to prevail when, as here, the State presents no evidence or presents evidence of insufficient moment to overcome the prima facie case so established.

It is said that the Supreme Court of necessity has developed the doctrine that a prima facie showing of unequal racial treatment, calling state procedures in question, compels the inference that the State is drawing the racial line unless it offers justification in non-racial factors for the disproportion. Jury selection and voting dilution cases such as *Hernandez* v. *Texas*, 347 U.S. 475 (1954), and *Gomillion* v. *Lightfoot*, 364 U.S. 339 (1960), are cited generally. Also cited, however, are other cases which, it is said, show that the prima facie approach has not been restricted to jury selection and voting cases. Among these are *Chambers* v. *Hendersonville City Bd. of Educ.*, 364 F.2d 189 (4 Cir. 1966) (reemployment of teachers), and *Cypress* v. *Newport News General & Nonsectarian Hospital Ass'n*, 375 F.2d 648 (4 Cir. 1967) (hospital staff membership). It is argued that there is no reason why the prima facie approach should not be applied to the present case. If there are factors which offset Dr. Wolfgang's expert conclusion, they were in the power of the State to unearth and prove. "Every justification for shifting the burden of persuasion to the State . . . applies with evident force here".

Finally, it is stated that the district court committed manifest error in its evaluation of the evidence. Counsel would dismiss the trial court's observation that the Arkansas figures contained instances of defendants tried more than once on the ground that each Arkansas jury death sentence is an indication of the application of the Arkansas statute. They would dismiss the trial court's concern with the small number of cases on the ground that the whole purpose of the statistical analysis was to satisfy Dr. Wolfgang as an expert and that he was so satisfied and his conclusions are sustainable under accepted scientific standards. They would dismiss the court's concern

with the geographical location of the selected Arkansas counties as unsupportable and improper. And they would dismiss the court's concern with the "issue of consent" as being "plainly the sheerest speculation". The observations are made that "any experienced criminal lawyer in the South . . . well knows that the failure to present the defense of consent in interracial rape cases is itself a product of the discriminatory pattern of Southern justice which petitioner here attacks", and that "Southern jury attitudes . . . have long impressed upon defense counsel the extreme unwisdom of advancing the consent defense on behalf of a Negro defendant where the complainant is white".[5]

The petitioner's argument is an interesting one and we are not disposed to say that it could not have some validity and weight in certain situations. Like the trial court, however, although perhaps not for each and all of the reasons it advanced, we feel that the argument does not have validity and pertinent application to Maxwell's case.

It is perhaps well to emphasize initially what the study and Dr. Wolfgang's testimony do not do or purport to do:

1. They do not relate specifically to Garland County where this particular offense was committed and where Maxwell was tried and convicted. They are concerned with 19 other Arkansas counties and with counties in 11 other states.[6]

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[5] However, the transcript of the state trial reveals that the defense in its opening statement made no less than five references to any act on the part of the prosecuting witness as being "free" and "voluntary".

[6] On the first habeas appeal we were unpersuaded with the statistics then presented or with the argument in support thereof. Some figures were submitted as to the entire State of Arkansas and as to three counties, namely, Garland (Hot Springs), Pulaski (Little Rock), and Jefferson (Pine Bluff). We said, pp. 330-31 of 348 F.2d

"The statistical argument is not at all persuasive. . . . As to Garland County, for the decade beginning January 1, 1954, Max-

2. They admittedly do not take every variable into account.

3. They do not show that the petit jury which tried and convicted Maxwell acted in his case with racial discrimination.

4. They do not deny that generally the burden of demonstrating discrimination in penalty imposition is on the one who asserts it. *Maxwell* v. *Stephens*, supra, p. 330 of 348 F.2d, and cases cited; *Mitchell* v. *Stephens*, 353 F.2d 129, 133 (8 Cir. 1965), cert. denied 384 U.S. 1019.

What we are concerned with here is Maxwell's case and only Maxwell's case. And it is indisputable, from the record before us, that, despite the five references to "free" and "voluntary" in the defense's opening statement at the trial, there is no question, and no hint of one, as to the victim's lack of consent. The facts of the attack, which are not in dispute, which were reviewed by the Arkansas court, pp. 114-16 of 370 S.W.2d, and which we have again quoted above, include forcible entry of the home, physical assault on both the victim and her aged father, resistance by both, and the infliction of injuries on all three. The petitioner's attack, therefore, to the extent it would con-

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well's evidence was to the effect that seven whites were charged with rape (two of white women and the race of the other victims not disclosed), with four whites not prosecuted and three sentenced on reduced charges; that three Negroes were charged with rape, with one of a Negro woman not prosecuted and another of a Negro receiving a reduced sentence, and the third, the present defendant, receiving the death penalty. . . .

"These facts do not seem to us to establish a pattern or something specific or useful here, or to provide anything other than a weak basis for suspicion on the part of the defense. The figures certainly do not prove current discrimination in Arkansas, for in the last fourteen years the men executed for rape have been two whites and two Negroes.

"Turning to the three county statistics, we find no death sentence at all in Garland County in the 1954-1963 decade until Maxwell's case. We also find that of the two other Negroes charged, one was not prosecuted and the other was sentenced on a reduced charge."

cern itself with the issue of consent in rape cases, both interracial and noninterracial, and with allegedly purposeful avoidance of the consent issue by southern defense counsel, has no place here and, in its attempted application, is a straw argument based on speculation.

Further, while it is true that it is in a sense the state which prosecutes, nevertheless the county has a character and a posture, too. Inasmuch as Garland County, as it was conceded, is in the predominantly white area of Arkansas, one might expect from the petitioner an argument that alleged southern injustice in interracial rape cases would be more apparent in such a county than in those areas where the negro population is predominant. Yet the Garland County statistics, which we noted at pp. 330-31 of 348 F.2d, and which we have again recited by quotation in footnote 6, supra, afford no local support to the petitioner's statistical argument. The evidence produced at the prior hearing and at this one discloses only Maxwell as a recipient of the death penalty in Garland County for rape.

We are not yet ready to condemn and upset the result reached in every case of a negro rape defendant in the State of Arkansas on the basis of broad theories of social and statistical injustice. This is particularly so on a record so specific as this one. And we are not yet ready to nullify this petitioner's Garland County trial on the basis of results generally, but elsewhere, throughout the South.

We therefore reject the statistical argument in its attempted application to Maxwell's case. Whatever value that argument may have as an instrument of social concern, whatever suspicion it may arose with respect to southern interracial rape trials as a group over a long

period of time, and whatever it may disclose with respect to other localities, we feel that the statistical argument does nothing to destroy the integrity of Maxwell's trial. Although the investigation and study made by Professor Wolfgang in the summer of 1965 is interesting and provocative, we do not, on the basis of that study, upset Maxwell's conviction and, as a necessary consequence, cast serious doubt on every other rape conviction in the state courts of Arkansas.

At oral argument we asked Professor Amsterdam, counsel for Maxwell, whether (apart from any Eighth Amendment argument) his statistical approach would not mean that it would be constitutionally impossible for a negro defendant in Arkansas ever to receive the death penalty upon conviction of the crime of rape of a white woman. The answer given us was in the affirmative, that is, that it would be constitutionally impossible. At the same time it was conceded, in contrast, that it would be possible for a white man to receive the death penalty upon his conviction for rape. When counsel was asked whether this would not be discriminatory, the reply was that once the negro situation was remedied the white situation "would take care of itself".

The legal logic and the rightness of this totally escape us. If that end result would actually be forthcoming (and we wonder whether this may accurately be forecast), that fact does not, in our view, make it legally right or satisfy constitutional dictates. We still read the first section of the Fourteenth Amendment as proscribing the denial "to any person" within a state's jurisdiction of "the equal protection of the laws". We feel that this means what it seems to require, namely, protection which is equal, and that equal protection is denied if, factually, a member of one race (whether black or white) is subjected, because of

his race, to greater or different punishment than a member of another race. The argument therefore turns back upon and defeats the very side which here proposes it. We are not inclined to accept as constitutional doctrine an abstraction which provides equality only through assumed and hoped-for day-to-day practicalities. It is the law, not probabilities or possibilities, which must afford equal protection.

We can understand and appreciate the disappointment and seeming frustration which Maxwell's counsel must feel in again failing to prevail on a still more sophisticated statistical approach. They will ask themselves just how far they are required to go in order to prevail.

We are not certain that, for Maxwell, statistics will ever be his redemption. The facts as to rape charges in Garland County are known and have been recited. Standing by themselves, they disclose nothing from which conclusions of unconstitutionality in application may appropriately be drawn. This situation—the aridity of the Garland County facts on which to claim unequal protection of the laws—forces Maxwell and his counsel to present his case on a state-wide and long-term historical approach, and even on a South-wide one, and to claim that conclusions which, at best, are necessarily general have valid application to Maxwell.

We do not say that there is no ground for suspicion that the death penalty for rape may have been discriminatorily applied over the decades in that large area of states whose statutes provide for it. There are recognizable indicators of this. But, as we have noted before, with respect to the issue of jury selection, improper state practice of the past does not automatically invalidate a procedure of the present. *Brown* v. *Allen*, 344 U.S. 443, 479

(1953); *Bailey v. Henslee*, 287 F.2d 936, 943 (8 Cir. 1961), cert. denied 368 U.S. 877. We do say that nothing has been presented in Maxwell's case which convinces us, or causes us seriously to wonder, that, with the imposition of the death penalty, he was the victim of discrimination based on race.

The Single Verdict Argument

This appears to divide itself into two parts. The first is that the Arkansas statutes which permit the state jury to choose between capital punishment and life imprisonment embrace no standards by which the jury is to exercise that choice and that, as a consequence, such jury procedure is unconstitutional. The second is that the state practice of submitting simultaneously to the jury the two issues of guilt and punishment in a capital case "compounds the vice of lawless jury discretion . . . by making it virtually impossible for the jurors to exercise their discretion in any rational fashion".

We are not persuaded by either argument.

A. We point out initially, as to the first, that the basic punishment imposed by § 41-3403 is death. This has been so at least since 1842. Act of December 14, 1842, § 1, p. 19. Capital punishment for rape has not yet been held to be violative of the Eighth and Fourteenth Amendments, although, as we noted on Maxwell's first habeas appeal, p. 332 of 348 F.2d, three Justices dissented from the denial of certiorari in *Rudolph v. Alabama*, 375 U.S. 889 (1963), and would have had the Court "consider whether the Eighth and Fourteenth Amendments to the United States Constitution permit the imposition of the death penalty on a convicted rapist who has neither taken nor endangered human life". That, however, is a fact situation

different from the instant case. We say again that if the death penalty for rape is to be nullified on constitutional grounds, that step in the first instance is for the Supreme Court and not for this inferior federal court. See *Ralph v. Pepersack*, 335 F.2d 128, 141 (4 Cir. 1964), cert. denied 380 U.S. 925.

The life imprisonment alternative came into the Arkansas statutes by Acts 1915, No. 187, § 1, p. 774. In operation it gave the Arkansas jury the power to alleviate punishment and extend clemency in cases (rape being just one of that category) where death had been the only punishment theretofore prescribed. The 1915 statute thus was in the direction of leniency and not away from it. *Kelley v. State*, supra, p. 54 of 202 S.W.; *Bell v. State*, 120 Ark. 530, 180 S.W. 186, 190 (1915).

Further, the imposition of punishment by the jury, within statutorily prescribed limits, rather than by the court, is the usual routine in Arkansas criminal procedure. § 43-2145.

We reject the petitioner's argument here for a number of reasons: (a) it has no basis in legislative intent; (b) it would destroy by indirection a punishment which the legislature saw fit to impose, which has been a component of the State's criminal law for well over a century, and which in all that time has not been subjected to successful constitutional attack; (c) the defense in Maxwell's rape trial requested no instructional standards; (d) the jury choice provides room for attention to the very variables which Professor Wolfgang's study concededly did not reach; and (e) we are not convinced that the absence of expressly stated standards in the statute requires that it be forthwith condemned constitutionally. Jurors are not automatons. They are human beings. The jury system

appropriately assumes that jurors in their factual determinations bring into play their common sense and the experiences of life. Their choice between capital punishment and life imprisonment, as the entire Arkansas method of punishment imposition by the jury, is not startlingly or shockingly different from the situation where choice of punishment within statutorily prescribed limits is for the judge. See *Witherspoon* v. *Illinois*, . . . U.S. . . . (1968).

The authorities proffered by the defense are the well-known ones, such as *Herndon* v. *Lowry*, 301 U.S. 242 (1937), and *Winters* v. *New York*, 333 U.S. 507 (1948), which deal with vagueness in criminal statutes. But there is nothing vague, and nothing is claimed to be vague, in the substantive provisions of the Arkansas rape statutes. The petitioner's attack is directed to the punishment and not to the crime.

But it is said that *Giaccio* v. *Pennsylvania*, 382 U.S. 399 (1966) "supports, if it does not compel, the conclusion that unfettered jury discretion in capital cases is unconstitutional". *Giaccio* concerned an ancient Pennsylvania statute which permitted a jury to assess costs against a defendant acquitted of a criminal charge and which called for imprisonment if such costs so assessed were not secured. The Supreme Court held that the statute was invalid under the due process clause "because of vagueness and the absence of any standards sufficient to enable defendants to protect themselves against arbitrary and discriminatory impositions of costs". P. 402. We think that the heart of the holding as to vagueness is that the offending statute "leaves the public uncertain as to the conduct it prohibits or leaves judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case". Pp.

402 03. The additional argument made in *Giaccio* that state court interpretations provided appropriate standards was also unavailing. At best, these centered generally in "some misconduct" which was "not reprehensible enough for a criminal conviction but sufficiently reprehensible to deserve an equal distribution of costs".

There is no question as to what is prohibited under the Arkansas rape statute. And the secondary argument in *Giaccio* is a far cry from that Arkansas statute. Of particular import is the Court's footnote 8, p. 405 of 382 U.S. to the effect that in reaching its conclusion that the Pennsylvania statute was invalid, "we intend to cast no doubt whatever on the constitutionality of the settled practice of many States to leave to juries finding defendants guilty of a crime the power to fix punishment within legally prescribed limits". Mr. Justice Stewart, in concurring, p. 405, felt that, despite this disclaimer, much of the reasoning in the opinion served to cast doubt "upon the settled practice of many States to leave to the unguided discretion of a jury the nature and degree of punishment to be imposed upon a person convicted of a criminal offense". No other Justice joined him in that observation. We have no alternative, therefore, except to conclude that footnote 8 means what it says and that the Court did not, by its decision in *Giaccio*, cast doubt upon the constitutionality of a state practice which leaves to juries the power to fix punishment within legally prescribed limits. This thought was specifically applied later in a capital case by the majority opinion in *Spencer* v. *Texas*, 385 U.S. 554, 560 (1967).[7] We are not impressed with the defense's char

[7] "Nor is it contended that it is unconstitutional for the jury to assess the punishment to be meted out to a defendant in a capital or other criminal case, or to make findings as to whether there was or was not a prior conviction even though enhanced punishment is left to be imposed by the judge. The States have always been given wide leeway in dividing responsibility between judge and jury in criminal cases."

acterization of footnote 8 as only a "careful reservation of a question" and referable "to jury sentencing generally, not capital sentencing".

II. The second aspect of the argument is that the Arkansas single verdict procedure "raises the gravest questions of procedural fairness". The usual points are advanced, namely, the right to allocution; the restriction of this right in single verdict procedure; and the conflict in such procedure between that right and the right not to incriminate oneself. What is suggested is the split verdict procedure.

All these arguments were made and the same cited cases were considered when we heard en banc and decided *Pope v. United States*, 372 F.2d 710, 727-30 (8 Cir. 1967), judgment vacated on other grounds, ... U.S. ... (June 17, 1968). We recognized in that federal case that the issue was not an easy one, that it largely disappears when criminal procedure takes its traditional course and punishment is imposed by the judge rather than by the jury, and that the issue seems to suggest the possibility of the two stage trial. There, too, as here, no request was made of the district court for a two stage trial. We stated our position[8] and concluded that the unitary trial was not error. We felt fortified in that conclusion by the Supreme

[8] "We find ourselves about where the Second Circuit majority found itself in *Curry*. We are not disposed to say that, despite the long accepted unitary trial concept, the two-stage trial is not available at all. We are not disposed to say that a trial judge may not appropriately exercise his discretion in this area. But we are also not disposed to say that the trial court's failure to order *sua sponte* a two-stage trial for Duane Pope was error or an abuse of discretion.

"It may be that the two-stage trial can be appropriately developed and made to serve a useful purpose under these statutes as they presently exist. It may be that the better solution is for the statutes to be revised so as to place the punishment power back in the hands of the judge where it traditionally has rested. It may be that the ultimate answer is legislation authorizing some narrow appellate review of sentences in these extreme cases. These, however, are primarily legislative matters for the Congress and not for the judiciary."

Court's remark in *Spencer* v. *Texas*, supra, p. 568 of 385 U.S.:

> "Two-part jury trials are rare in our jurisprudence; they have never been compelled by this Court as a matter of constitutional law, or even as a matter of federal procedure."

Until the Supreme Court tells us otherwise, we feel that what we said and concluded on this point in *Pope* v. *United States* has equal application to this state case. We adhere to the result reached on this issue in that en banc decision.

The Jury Selection Argument

This point was made on the first habeas appeal and, although it has not been raised in the state court, it was carefully considered by this court and rejected. Pp. 332-34 of 348 F.2d. The argument urged on that appeal[9] was that in Arkansas at the time of Maxwell's trial petit jurors were selected from electors; electors were persons who had paid the State's poll tax; the official list of a county's poll taxpayers and the poll tax receipts specified race; and the jury list itself indicated race. Ark. Stat. Ann. §§ 39-208, 3-104.2, 3-118, and 3-227(b).[10]

We reviewed the applicable Supreme Court opinions and our own earlier decisions in *Bailey* v. *Henslee*, supra, 287 F.2d 936, and *Henslee* v. *Stewart*, 311 F.2d 691 (8 Cir.

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9 We there noted, p. 332 of 348 F.2d, that on the appeal, in contrast to the situation in the district court, pp. 213-16 of 229 F.Supp., no issue was raised as to deficiencies in the efforts or methods of the jury commissioners, as to under-representation of the negro race in the county jury lists, or as to any pattern of negro repeaters on the juries.

10 Amendment No. 51 to the Arkansas Constitution, known as the "Arkansas Amendment for Voter Registration without Poll Tax Payment", effective, except for one minor proviso, January 1, 1965, eliminated the poll tax requirement and with it the color references theretofore appearing in the cited statutes. See *Walker* v. *State*, 241 Ark. 300, 408 S.W.2d 905, 915 (1966), cert. denied 386 U.S. 682.

1963), cert. denied 373 U.S. 902, in each of which we had concluded that a prima facie case of limitation in jury selection, because of race, had been established. But we reached the opposite conclusion in Maxwell's first appeal, primarily *because there was no proof whatsoever that the jury list was compiled from the poll tax list.* The evidence was all the other way and uncontradicted, namely, that the list was first *independently* prepared and only then was the poll tax book consulted, as it had to be in order to ascertain that the persons tentatively selected were qualified electors. We felt that we could not say that, because the poll tax receipts and books designated race, it necessarily followed that every jury list in Arkansas was automatically unconstitutional; so to conclude would ignore the possibility of the selection being initially made, as the proof in Maxwell's case showed, wholly apart from the poll tax list. We adhered to this conclusion in the later similar case, on this point, of *Mitchell* v. *Stephens*, supra, 353 F.2d 129, 133-34.

Presumably, Maxwell and his counsel are not convinced of the rightness of our decision on this point in the first appeal. Nevertheless, the decision was made by a unanimous panel and the Supreme Court did not see fit to disturb it. Having decided the issue, we do not now undecide it in order to reach the opposite result.

The point is repeated, moreover, by Maxwell and counsel on his second habeas petition because, it is said, the granting of certiorari, limited to five questions, in *Sims* v. *Georgia*, 384 U.S. 998 (1966) [the same day certiorari was denied in *Mitchell* v. *Stephens*, supra] and the decision in *Whitus* v. *Georgia*, 385 U.S. 545 (1967), require reversal.

Sims v. *Georgia* was also an interracial rape case with a Negro as defendant. The fourth question as to which

certiorari was granted related to the constitutionality of a conviction where "local practice pursuant to state statute requires racially segregated tax books and county jurors are selected from such 'books'", where Negroes comprise only 5% of the jurors selected but about 20% of the taxpayers, and where the defendant offered to prove a practice of arbitrary and systematic Negro inclusion or exclusion based on jury lists of the prior ten years but his offer was disallowed. Sims' conviction was reversed and his case remanded on the ground that a voluntariness of confession issue was controlled by *Jackson* v. *Denno*, 378 U.S. 368 (1964), and that the Supreme Court of Georgia had erred in holding that *Jackson* was not applicable. This was the second of the five certiorari questions. The Supreme Court therefore did not reach any of the issues raised by the other four questions. *Sims* v. *Georgia*, 385 U.S. 538 (1967). The significance of the *Sims* case for Maxwell thus is that the Supreme Court was willing to grant, and did indeed grant, certiorari on a question related to racially segregated tax books, the selection of jurors from such books, the misproportion of negro jurors to negro taxpayers, and a disallowed offer of proof of arbitrary and systematic exclusion for ten years.

Merely stating the question reveals the inapplicability of the fourth Sims question to Maxwell's case. It is true that at the time of Maxwell's trial, as we have repeatedly noted, Arkansas procedure called for racially designated elector lists. But as has already been pointed out, the uncontradicted proof in Maxwell's case was that the petit jurors were not selected from those lists, although the lists were later checked, as they had to be, in order to determine that the jurors selected were qualified electors. There is no assertion here of misproportion of negro jurors

to negro taxpayers or negro electors or negro citizens. And there is nothing before us by way of claim of systematic negro exclusion on Garland County jury lists for any period of time.

Similarly, we fail to see where *Whitus* v. *Georgia* and subsequent rulings based on *Whitus*, namely, *Bostick* v. *South Carolina*, 386 U.S. 479 (1967); *Cobb* v. *Georgia*, 389 U.S. 12 (1967); *Jones* v. *Georgia*, 389 U.S. 24 (1967); *Sims* v. *Georgia*, 389 U.S. 404, 407-08 (1967); see *Coleman* v. *Alabama*, 389 U.S. 22 (1967), afford anything new or anything not fully discussed and fully decided on Maxwell's prior habeas appeal. The Georgia jury lists, under attack in *Whitus*, were made up from a racially designated tax digest and by reference to the old jury list theretofore condemned in *Whitus* v. *Balkcom*, 333 F.2d 496 (5 Cir. 1964), cert. denied 379 U.S. 931. And again there was serious disproportion of negro representation. The Court quite expectedly held that such proof constituted a prima facie case of purposeful discrimination, for the fact situation fell in line with that in *Avery* v. *Georgia*, 345 U.S. 559 (1953), cited by the Supreme Court and also by us on the first appeal, p. 332 of 348 F.2d. A construction, for Maxwell's case, of footnote material similar to that found in *Jones* v. *Georgia*, supra, at p. 25 of 389 U.S., would be contrastingly revealing. In Maxwell's case, we repeat, we have no question whatsoever of inappropriate negro representation on the Garland County jury list, we have a negro commissioner, and we have jury lists independently prepared prior to the statutorily required reference to the poll tax rolls. The jury list, thus, was not prepared from condemned or racially designated lists. The petitioner's position here would render it impossible to try a negro defendant for any crime in the State of Arkansas prior to the adoption of Amendment No. 51. On the facts such a stricture is not constitutionally required.

Sims and *Whitus* therefore fail to afford reversing precedent.

Although the point has not been raised to us, a comment relative to the Supreme Court's recent decision in *United States* v. *Jackson*, ... U.S. ... (1968), may be indicated. In *Jackson* the Court held unconstitutional the death penalty provision of the Federal Kidnaping Act, 18 U.S.C. § 1201(a). Does that holding suggest the constitutional invalidity of the Arkansas death penalty for rape, under the Fifth and Sixth Amendments which now, through the Fourteenth, have an area of application to the states? See *Malloy* v. *Hogan*, 378 U.S. 1, 8 (1964); *Gideon* v. *Wainwright*, 372 U.S. 335 (1963).

We readily conclude that *Jackson* does not require a holding of invalidity of the Arkansas death penalty. *Jackson*, as we read the opinion, pivoted on the fact that the defendant's assertion of his right to a jury trial might cost him his life, "for the federal statute authorizes the jury—and only the jury—to return a verdict of death" and thus subjects the defendant who does not plead guilty and who asks for a jury trial to the hazard of capital punishment. The Arkansas rape punishment situation is not the same. As we have pointed out above, the Arkansas procedure in criminal cases is for the jury to affix the punishment within the limits statutorily defined. § 43-2145. Although § 43-2306 provides that when a jury fails to agree on the punishment or to declare the punishment in their verdict or if they assess punishment not authorized by law, "and in all cases of a judgment on confession", the court shall assess and declare the punishment. But § 43-2108 states that a trial by jury may be waived "except where a sentence of death may be imposed". And the Supreme Court of Arkansas has spe-

cifically held in a rape case, where the defendant had entered a plea of guilty, that it was mandatory to impanel a jury to fix the punishment. *Scarber v. State*, 226 Ark. 503, 291 S.W.2d 241, 243 (1956). Thus, in contrast to the Federal Kidnaping Act, an Arkansas defendant, by entering a plea of guilty in a capital case, does not avoid a trial by jury on the issue of punishment. The critical choice under the federal act which occasioned the result in *Jackson*, is thus not present under the Arkansas statutes.

It is obvious, we think, that the efforts on behalf of Maxwell would not thus be continuing, and his case reappearing in this court were it not for the fact that it is the death penalty, rather than life imprisonment, which he received on his rape conviction. This fact makes the decisional process in a case of this kind particularly excruciating for the author of this opinion[1] who is not personally convinced of the rightness of capital punishment and who questions it as an effective deterrent. But the advisability of capital punishment is a policy matter ordinarily to be resolved by the legislature or through executive clemency and not by the judiciary. We note, for what that notice may be worth, that the death penalty for rape remains available under federal statutes. 18 U.S.C. § 2031; 10 U.S.C. § 920(a).

Affirmed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

[1] Judges Vogel and Matthes do not join in this comment.

Judgment of the Court of Appeals

(Filed July 11, 1968)

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 18,746

SEPTEMBER TERM, 1967

WILLIAM L. MAXWELL,

Appellant

—v.—

O. E. BISHOP, Superintendent of the Arkansas State Penitentiary,

Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF ARKANSAS

This cause came on to be heard on the record from the United States District Court for the Eastern District of Arkansas, and was argued by counsel.

On Consideration Whereof, It is now here Ordered and Adjudged by this Court that the Order of the said District Court of August 26, 1966, denying Petition for Writ of Habeas Corpus in this cause be, and the same is hereby, affirmed.

July 11, 1968

Order entered in accordance with Opinion:—

/s/ ROBERT C. TUCKER
Clerk, U. S. Court of Appeals
for the Eighth Circuit

Order Granting Writ of Certiorari

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 622

WILLIAM L. MAXWELL,

Petitioner,

—v.—

O. E. BUSHOR, Superintendent Arkansas State Penitentiary.

The petition for a writ of certiorari is granted, limited to questions 2 and 3 of the petition, which read as follows:

> 2. Whether Arkansas' practice of permitting the trial jury absolute discretion, uncontrolled by standards or directions of any kind, to impose the death penalty violates the Due Process Clause of the Fourteenth Amendment?
>
> 3. Whether Arkansas' single-verdict procedure, which requires the jury to determine guilt and punishment simultaneously and a defendant to choose between presenting mitigating evidence on the punishment issue or maintaining his privilege against self-incrimination on the guilt issue, violates the Fifth and Fourteenth Amendments?

The case is placed on the summary calendar and set for oral argument immediately following No. 642.

December 16, 1968

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IN THE

Supreme Court of the United States

OCTOBER TERM, [redacted] 1969

No. [redacted] 13.

WILLIAM L. MAXWELL,

Petitioner,

—v.—

O. E. BISHOP, Superintendent,
Arkansas State Penitentiary,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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In the

Supreme Court of the United States

October Term, 1968

No.

William L. Maxwell,

Petitioner,

v.

O. E. Bishop, Superintendent,
Arkansas State Penitentiary,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered on July 11, 1968.

Citation to Opinions Below

The opinion of the United States District Court for the Eastern District of Arkansas denying petitioner's application for a writ of habeas corpus is reported at 257 F. Supp. 710, and is set out in Appendix A hereto, pp. 1a-22a *infra*. The opinion of the United States Court of Appeals for the Eighth Circuit affirming the denial of petitioner's application is not yet reported and is set out in Appendix A hereto, pp. 24a-55a *infra*.

Opinions at earlier stages of this proceeding are reported. The opinion of the Supreme Court of Arkansas affirming petitioner's conviction for the crime of rape and sentence of death is found *sub nom. Maxwell v. State*, 236 Ark. 694, 370 S.W. 2d 113 (1963). Opinions on disposition of an earlier application for habeas corpus are found *sub nom. Maxwell v. Stephens*, 229 F. Supp. 205 (E. D. Ark. 1964), *aff'd*, 348 F.2d 325 (8th Cir. 1965), *cert. denied*, 382 U.S. 944 (1965).

Jurisdiction

The judgment of the United States Court of Appeals for the Eighth Circuit was entered July 11, 1968. Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Questions Presented

1. Whether petitioner's proof that Arkansas juries have followed a systematic practice of racial discrimination in sentencing men to death for the crime of rape establishes a *prima facie* case which, in the absence of any rebuttal or explanation by the State, requires the constitutional invalidation of the death sentence imposed upon petitioner, a Negro convicted of rape of a white woman? This question is framed by a record of uncontradicted expert statistical testimony based upon an exhaustive study of the patterns of capital sentencing by Arkansas juries in rape cases. It is presented against the background of Arkansas' procedures for capital sentencing which leave unfettered and undirected discretion to the jury to bring in a verdict of death or life, and which deny the defendant a separate hearing for the presentation of evidence upon which rational sentencing choice may be based. The question subsumes the issues:

(a) Whether the courts below correctly held that the principles developed by this Court in several contexts relative to a *prima facie* showing of racial discrimination are inapplicable to proof of racial discrimination by juries in capital sentencing?

(b) Whether the showing by petitioner below did not make out a *prima facie* case which, under proper constitutional standards for the evaluation of proof, compelled a finding of racial discrimination in the absence of any rebuttal evidence?

(c) Whether the courts below correctly held that petitioner could not prevail upon an accepted showing of statewide discrimination in capital sentencing for rape, because he did not in addition prove (i) a similar pattern of discrimination in the particular *county* in which he was tried (where the cases were too few to establish a pattern), or (ii) that the particular jury which sentenced him was racially motivated?

(d) Whether the Court of Appeals correctly held that petitioner could not prevail as a matter of law on his challenge to his death sentence as discriminatorily imposed, because the consequence of his argument would temporarily leave only white defendants subject to the death penalty under present Arkansas procedures?

2. Whether Arkansas' practice of permitting the trial jury absolute discretion, uncontrolled by standards or directions of any kind, to impose the death penalty violates the Due Process Clause of the Fourteenth Amendment?

3. Whether Arkansas' single-verdict procedure, which requires the jury to determine guilt and punishment simultaneously and a defendant to choose between presenting mitigating evidence on the punishment issue or maintain-

Constitutional and Statutory Provisions Involved

Statement

prohibition of cruel and unusual punishment were violated by the imposition of the death penalty for rape; and (c) that the Equal Protection Clause was violated by the systematic exclusion of Negroes from his trial jury, in particular because the jurors had been selected under Arkansas statutory procedures by reference to poll tax books in which racial identifications were required by law. The district court found that no sufficient showing of racial discrimination in capital sentencing had been made and, rejecting petitioner's other federal contentions, denied the writ. *Maxwell v. Stephens*, 229 F. Supp. 56 (E.D. Ark. 1964). The Court of Appeals for the Eighth Circuit affirmed after considering and rejecting petitioner's available evidence in support of his claim of racial discrimination in capital sentencing. This included with the statistics which he had previously presented relating to the number of Negro and white executions in Arkansas for the crime of rape since 1913, and sentencing statistics covering Garland, Pulaski and Jefferson Counties, Arkansas from January 1, 1956, to the date of petitioner's habeas corpus hearing in 1964. Petitioner had attempted to demonstrate on the basis of these statistics, by reference to the race of the defendants who had been sentenced to death and of the victims of the crimes of which they had been convicted, that there was a state-wide pattern of discriminatory capital sentencing for Negroes; but the court found, on that record, that petitioner's statistical argument was not at all persuasive." 348 F.2d 325, 330 (8th Cir. 1965).[1]

[1] Petitioner's then available evidence in support of his claim of racial discrimination was summarized in the court's opinion as set forth below:

> "The evidence as to the state at large showed that in the 49 years since 1913, 21 men have been executed for the crime of rape; that 19 of these were Negroes and two were white; that the victims of the 19 executed Negroes were white females and that the victims of the two executed whites were

B. Second Federal Habeas Corpus Proceeding

July 21, 1966 the present application for federal habeas corpus was filed, alleging that new evidence had become available since the disposition of petitioner's prior habeas appeal with respect to the claim of systematic racial discrimination in the exercise of capital sentencing discretion by Arkansas juries. Petitioner also raised two related claims not previously made: (1) That Arkansas' "single verdict" procedure for capital sentencing, under which the issues of guilt and punishment are simultaneously tried and submitted to the trial jury, is federally

> also white females. As to Garland County, for the decade beginning January 1, 1951, Maxwell's evidence was to the effect that seven whites were charged with rape (two of white women and the rape of the other victims not disclosed), with four whites not prosecuted and three sentenced on reduced charges, that three Negroes were charged with rape, with one of a Negro woman not prosecuted and another of a Negro receiving a reduced sentence, and the third, the present defendant, receiving the death penalty. With respect to Pulaski County for the same decade, there were 11 whites (two twice) and 10 Negroes charged, with the race of the victim of two whites and one Negro not disclosed. Three whites received a life sentence. One white was acquitted of rape of a Negro woman. One received a sentence on a reduced charge, two were dismissed, two cases remained pending, one was not prosecuted, and the last was executed on a conviction of murder of the Negroes, three with white victims and two with Negro victims received life. One case was dismissed, one was not arrested, two with Negro victims were sentenced on reduced charges, and one, Bailey, with a white victim, was sentenced to death. In Jefferson County eight Negroes were charged, with the cases against five dismissed, another dismissed when convicted on a murder charge, and two receiving sentences on reduced charges. Sixteen whites were charged. One was charged three times with respect to Negro victims and on two of these charges received five years suspended on a guilty plea. Two others received three year sentences. One is pending, one was executed, and the rest were dismissed. The race of four defendants was not disclosed, three of these cases were dismissed and one is pending." 18 F.2d at 180 (footnotes omitted).

"It was agreed that counsel for Maxwell will make those schedules available for the inspection of counsel for Respondent not later than August 10 and will also furnish the names and addresses of the field workers who assembled the original data in Arkansas. Not later than August 15 counsel for Respondent will advise opposing counsel and the Court as to whether, to what extent, and on what grounds he questions any individual case schedule.

"Subject to objections on the ground of relevancy and materiality, and subject to challenges to individual case schedules, Professor Wolfgang will be permitted to testify as an expert witness and to introduce his report as a summary exhibit reflecting and illustrating his opinions. Again subject to objections or challenges to individual schedules there will be no necessity for Petitioner to introduce the schedules in evidence or prove the source of the information reflected thereon or therein, or to call the individual field workers as witnesses." (Pre-Trial Conference Order, p. 4.)

When the case came on for hearing counsel for petitioner announced that no objections had been made by the respondent to any of the individual case schedules on the ground that all of the facts in the schedules are treated as though they are true, and Dr. Wolfgang's testimony is to be treated as though based upon the schedules, for the facts which are established of record. (R. 4.) Counsel stated it the basic facts on which Dr. Wolfgang's testimony and his analysis are made are treated as established for the purpose of the case. (R. 4.) Counsel for respondent and the court agreed with the statement (R. 4-5), the court stating that

be relied upon together with Dr. Wolfgang's testimony in the summary of evidence that follows.

The district court's opinion fairly summarizes the "background facts of the Wolfgang study":

> "In early 1965 Dr. Wolfgang was engaged by the NAACP Legal Defense and Educational Fund, Inc. to make a study of rape convictions in a number of southern States, including Arkansas, to prove or disprove the thesis that in those States the death penalty for rape is disproportionately imposed upon Negro men convicted of raping white women. Dr. Wolfgang was apprised of the fact that the results of his study might well be used in litigation such as the instant case.
>
> "As far as Arkansas is concerned, Dr. Wolfgang caused Mr. John Monroe, a qualified statistician, to select a representative sample of Arkansas counties with reference to which the study would be made. The sample drawn by Mr. Monroe, who testified at the hearing, consisted of 19 counties in the State.
>
> "During the summer of 1965 law students interested in civil rights problems were sent into Arkansas to gather basic data with respect to all rape convictions in the sample counties for a period beginning January 1, 1945, and extending to the time of the investigation. Data obtained as to individual cases were recorded on individual case schedules. When the work was completed, the individual schedules were turned over to Dr. Wolfgang for evaluation.

[*] The general scope of the study, which gathered data concerning every case of conviction for rape during a 20-year period in 250 counties in eleven States, is described more fully in the affidavit of Norman G. Amaker, Esq., attached as Exhibit 2 to the petition for habeas corpus. For other descriptions, see the Memorandum and Order, dated July 18, 1966, appended to the opinion in *Maxwell v. South Carolina*, 368 F.2d 458 (4th Cir. 1966), and the opinion in *Matter of Sims and Abrams*, 389 F.2d 148 (5th Cir. 1967).

> "The investigation brought to light 55 rape convictions during the study period involving 34 Negro men and 21 white men. The offenses fell into three categories, namely: rapes of white women by Negro men; rapes of Negro women by Negro men; and rapes of white women by white men. No convictions of white men for raping Negro women were found." (257 F. Supp. at 718, App. A, pp. 15a-16a *infra*. See also the opinion of the Court of Appeals, App. A, pp. 30a-31a *infra*.)

The design of the investigation was described by Dr. Wolfgang as a function of its objectives "to collect the appropriate kind of data necessary to provide some kind of empirical study, either in support of, or in rejection of, the underlying assumption" (Tr. 17)—i.e., that there is racially differential imposition of the death penalty for rape in the States studied (Tr. 16-17)—and "to give the empirical data the appropriate kind of statistical analysis that would satisfy scientific requirements" (Tr. 17). The basic research methodology involved these several stages: (1) identification of the cases to be studied; (2) collection of data concerning the critical variables (race of defendant, race of victim, sentence imposed) in each case, and statistical analysis of the relationship between these variables; (3) collection of data concerning other variables ("control" variables) in each case, and statistical analysis of the relationship between each such variable and the critical variables (race and sentence) to determine whether the operation of the control variables could explain or account for whatever relationship might be observed between the critical variables; (4) reporting of results of the analysis. It is convenient to summarize the evidence presented to the district court under these four heads, with respect to the Arkansas study. Such a summary can

only imperfectly portray the character and range of the Wolfgang study. We respectfully invite the Court's attention to the whole record of the hearing below.

1. Identification of the Cases to Be Studied.

Data were gathered concerning every case of conviction for rape during a 20-year period (January 1, 1945 to the summer of 1965) in a representative sample of Arkansas counties (Tr. 21). Two points should be noted here.

First, because the study begins with cases of *conviction for rape*, it addresses itself at the outset to the possibility suggested by the Supreme Court of Arkansas on the direct appeal in petitioner's case, *Maxwell v. State*, 236 Ark. 694, 370 S.W.2d 113 (1963), that any showing that Negroes are more frequently sentenced to death for rape than whites might be accounted for by the supposition that Negroes commit rape, or are convicted of rape, more frequently than whites. What is compared in this study is the rate of capital sentencing of Negro and white defendants *all of whom* have been convicted of rape.

Second, in order to give a valid basis for generalization about the performance of Arkansas juries, *every* case of conviction for rape in a randomly selected sample of Arkansas counties was included in the study (Tr. 62-63). The county sampling procedure was employed because resources available for the field study did not permit the gathering of data in every county in the State (Tr. 21, 107-111), and because it is "unnecessary to collect every individual case, so long as the sample is presumed to be a valid representation—a valid representative one" (Tr. 21). At Dr. Wolfgang's request, a random sample (Tr. 128) of Arkansas' 75 counties was drawn by Mr. John Monroe, a "qualified statistician" (257 F. Supp. at 718; App. A, p. 15a *infra*), with seventeen years experience in sampling

and surveys (App. A, pp. 34a-35a *infra*).[7] Testifying below, Mr. Monroe described in detail the sampling process used (Tr. 107-141) to draw counties "in such a manner that the sample counties within each state would provide a representative sampling for that state so that inferences could be drawn for each state in the sample and for the region as a whole" (Tr. 107). Nineteen counties in the State (Tr. 28, 118; 122-123; Petitioner's Exhibit P-5, appendices C, D; Petitioner's Exhibit P-7) containing more than 47 per cent of the total population of Arkansas (Petitioner's Exhibit P-4, p. 1; Tr. 130) were drawn by a "theoretically unbiased" random method (Tr. 118). See App. A, pp. 35a-36a *infra*. Mr. Monroe testified that "a sample is the procedure of drawing a part of a whole, and if this sample is drawn properly according to the law of chance, or with known probability, by examining a small part of this whole, and using the appropriate statistical methods, one can make valid inferences about the whole population from examining a small part" (Tr. 116). He concluded that his own sample of Arkansas counties "is a very reliable sample under the restrictions that we were confined to, the number of counties that could be investigated during the time allotted. In other words, for the size of the sample, the 19 counties, it was a very reliable and highly acceptable sample insofar as sampling statistics are concerned" (Tr. 118; see also Tr. 130, 132). "I would say that, as far as the sample is concerned, the inferences drawn from this sample, as described, are valid for the State of Arkansas" (Tr. 135).

(These conclusions were not questioned by the courts below, although, as we shall see, both courts were con-

[7] Mr. Monroe's qualifications appear at Tr. 104-106. His biography, in summary form, was admitted as Petitioner's Exhibit P-10 (Tr. 144-145).

verned over the circumstance that Mr. Monroe's areal sampling methods resulted in the selection of counties that lie principally in the southern and eastern portions of the State. This circumstance was apparently not thought to impugn the sample's *factual* representativeness—to the contrary, as the record shows and the district court found (257 F. Supp. at 720, App. A, p. 19a *infra*), the sampling method was "acceptable statistically"—but it was given importance by the *legal* theory of both courts that petitioner was required to show that Garland County, not the State of Arkansas as a whole, applied the death penalty for rape discriminatorily. The legal issue thus raised is one of those on which this petition for certiorari seeks review. See pp. 55-56 *infra*. What it is important to note here is simply that neither court below contested the uncontradicted factual assertions of Mr. Monroe, as an expert statistician, that conclusions drawn from data gathered in his sample counties would be valid for the State of Arkansas. See App. A, p. 35a *infra*.)

2. Data Concerning the Critical Variables (Race and Sentence) and Statistical Analysis of the Relationship Between Them.

For each individual case of conviction of rape, data were gathered as to race of defendant, race of victim, and sentence imposed (Tr. 28-30).[5] Using approved statistical techniques, analysis was performed to determine the relationship among these variables (Petitioner's Exhibit P-4,

[5] The sources from which these data, and other data relating to the individual cases of rape convictions studied, were obtained is described in detail in Petitioner's Exhibit P-3, pp. 1-6. See note 10, *infra*. Because the accuracy of all the basic data was conceded by the respondent below, see text *supra* at pp. 10-12, methods of data collection and data sources were not developed at the hearing, and Exhibit P-3 was put in merely for the information of the court.

pp. 2-4). Briefly, the analysis involved these steps: (a) erection of a mathematically testable "null hypothesis" "asserting there is no difference in the distribution . . . of the sentence of death or life imprisonment imposed on Negro or white defendants" (Tr. 30-31; see also Tr. 31-32); (b) calculation of a "theoretical or expected frequency" (Tr. 33) which represents the number of Negro defendants and the number of white defendants (or, more specifically, the number of Negro defendants convicted of rape of white victims, and of all other defendants) who would be expected to be sentenced to death if the null hypothesis (that sentence is not related to race) were valid (Tr. 32-33); (c) comparison of this "theoretical or expected frequency" with the frequency of death sentences actually observed in the collected data for each racial combination of defendants and victims; and (d) determination whether the discrepancy between the expected and observed frequencies is sufficiently great that, under generally accepted statistical standards, that discrepancy can be said to be a product of the real phenomena tested, rather than of the operation of chance within the testing process, sampling, etc. (Tr. 33-37). "If that difference reaches a sufficiently high proportion, sufficiently high number, then the assertion can be made, using again the traditional cut-off point,' that the difference is significant and could not have occurred by

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'Dr. Wolfgang explained in considerable detail the procedures by which relations among items of observed data are tested statistically for reliability, "not only in sociology and social sciences, but other disciplines as well . . . such as medical research" (Tr. 36). The basic procedure used in the present study—the chi-square method of statistical analysis and the traditional measure of statistical "significance" which treats as real observed relationships that could not have occurred more than five times out of one hundred by chance (expressed in the formula $P < .05$)—is described at Tr. 33-37, with explanation of these matters by reference to the familiar example of head-or-tail coin tossing.

chance" (Tr. 34). See App. A, pp. 30a-31a *infra*. The result of this analysis, then, is the determination whether there is a relationship or "association" between Negro defendants convicted of rape of white victims and the death sentence imposed by Arkansas juries; and if so, whether that relationship or association is "significant" in the statistical sense that the possibility of its occurrence by chance is so slight as properly to be discounted. (See Petitioner's Exhibit P-4, pp. 2-4.) (As we shall see *infra*, such a relationship, showing disproportionately frequent death sentencing of Negroes convicted of rape of white victims, was in fact established by the data.)

3. Data Concerning "Control" Variables.

Data gathering did not stop, however, with the facts of race and sentence. As explained by Dr. Wolfgang, data were collected on numerous other circumstances attending each case of conviction for rape that "were felt to be relevant to the imposition of the type of sentence" (Tr. 40). These data were sought by the exhaustive inquiries that occupy 28 pages of small type on the data-gathering form that is Petitioner's Exhibit P-2—inquiries concerning the defendant (age; family status; occupation; prior criminal record; etc.), the victim (age; family status; occupation; husband's occupation if married; reputation for chastity; etc.), defendant-victim relationship (prior acquaintance if any; prior sexual relations if any; manner in which defendant and victim arrived at the scene of the offense), circumstances of the offense (number of offenders and victims; place of the offense; degree of violence or threat employed; degree of injury inflicted on victim if any; housebreaking or other contemporaneous offenses committed by defendant; presence *vel non* at the time of the offense of members of the victim's family or others, and threats or violence employed, or injury inflicted if any,

upon them; nature of intercourse; involvement of alcohol or drugs; etc.), circumstances of the trial (plea; presentation *vel non* of defenses of consent or insanity; joinder of defendant's rape trial with trial on other charges or trial of other defendants; defendant's representation by counsel (retained or appointed) at various stages of trial and sentencing; etc.), and circumstances of post-trial proceedings if any. See App. A, pp. 31a-32a *infra*.

The district court aptly characterized these factors as "Generally speaking, and subject to certain exceptions, . . . variables . . . which reasonably might be supposed to either aggravate or mitigate a given rape" (257 F. Supp. at 718 n. 8; App. A, p. 16a *infra*). Their exhaustive scope appears upon the face of Petitioner's Exhibit P-2, and from Dr. Wolfgang's testimony: "The principle underlying the construction of the schedule [Petitioner's Exhibit P-2] was the inclusion of all data that could be objectively collected and transcribed from original source documents that were available to the investigators—the field investigators—such as appeal transcripts, prison records, pardon board records, and so forth, and whatever was generally available was included. In this sense, it was a large eclectic approach that we used for the purpose of assuring ourselves that we had all available data on these cases" (Tr. 96-97; see also Tr. 65-70). Dr. Wolfgang conceded that some data potentially pertinent to sentencing choice were not collected —for example, strength of the prosecution's case in each individual rape trial—but explained that this was because such items were not information "that we could objectively collect" (Tr. 97). See App. A, p. 32a *infra*.

The pertinency of these data to the study was that some of the many circumstances investigated, "rather than race alone, may play a more important role in the dispropor-

tionate sentencing to death of Negro defendants convicted of raping white victims" (Tr. 40).

> "These factors, not race, it could be argued, may be determining the sentencing disposition; and Negroes may be receiving death sentences with disproportionate frequency only because these factors are disproportionately frequent in the case of Negro defendants. For example, Negro rape defendants as a group, it may be contended, may employ greater violence or do greater physical harm to their victims than do white rape defendants; they may more frequently be represented at their trials by appointed rather than retained counsel, and they may more frequently commit contemporaneous offenses, or have a previous criminal record, etc." (Dr. Wolfgang's written report, Petitioner's Exhibit P-4, p. 5.)

In order to determine whether the control variables explained or accounted for the racial disproportion in death sentencing, analysis had to be made of the relationship between each such factor for which data were available and sentence on the one hand, race on the other. Dr. Wolfgang explained that no variable could account for the significant association between Negro defendants with white victims and the death sentence unless that variable "was significantly associated with the sentence of death or life" (Tr. 41), and unless it *also* was significantly associated with Negro defendants convicted for rape of white victims (Tr. 41-42).

A variable, even though associated with such Negro defendants (i.e., found disproportionately frequently in their cases), could not furnish a non-racial explanation for their over-frequent sentence to death unless it was itself affecting the incidence of the death sentence (as evidenced by

its significant association with the death sentence). (see, e.g., Tr. 45-46); while a variable which was *not* associated with Negro defendants convicted of rape of white victims could also not explain the frequency with which they, as a class, were sentenced to death (e.g., Tr. 49-52). (See generally Petitioner's Exhibit P-4, pp. 6-7.)

4. Results and Conclusions.

Based on his study of the data gathered for the past twenty years in the State of Arkansas, Dr. Wolfgang concluded categorically that *"compared to all other rape defendants, Negroes convicted of raping white victims were disproportionately sentenced to death."* (Dr. Wolfgang's written report, Petitioner's Exhibit P-4, p. 8, para. 3 (original emphasis).) "We found a significant association between Negro defendants having raped white victims and the disproportionate imposition of the death penalty in comparison with other rape convictions" (Tr. 52; see also Tr. 37-39). Indeed, the disparity of sentencing between Negroes with white victims and all other racial combinations of convicted defendants and victims was such that it could have occurred less than twice in one hundred times by chance (Tr. 37-38)—i.e., if race were not really related to capital sentencing in Arkansas, the results observed in this twenty-year study could have occurred fortuitously in two (or less) twenty-year periods since the birth of Christ. Thus, the Wolfgang study for the first time documents the discrimination which previously available data—not collected systematically or in a form permitting rigorous scientific analysis—could only suggest: for example, the Federal Bureau of Prisons' National Prisoner Statistics for executions during the period 1930-1962 (Petitioner's Exhibit P-6, Tr. 99-101), which disclose that more than nine times as many Negroes as whites were put to death for rape dur-

ing this period in the United States, although the numbers of Negroes and whites executed for murder were almost identical.

A considerable part of Dr. Wolfgang's testimony was addressed to the question whether this disproportion could be explained away or accounted for by the operation of other, non-racial ("control") variables. He testified that after the Arkansas data were collected, he considered and subjected to analysis every such variable or factor about which sufficient information was available to support scientific study (Tr. 56, 64-65, 78-80, 97). With respect to a substantial number of the variables investigated by the field researchers, their exhaustive exploration[19] failed to provide enough information for study. (E.g., victim's reputation for

[19] By reason of the court's pre-trial order and respondent's concession under the procedures fixed by that order that the responses recorded by the field researchers on the individual case schedules were accurate (see pp. 10-12, *supra*), petitioner did not present in any systematic fashion below testimony relating to the data-gathering procedures. The concession, of course, included the accuracy of the response "unknown" wherever that appeared on a schedule, and—as counsel for petitioner pointed out in the district court, without disagreement from respondent or the court—the response "unknown" "means that research, using the State's records and using all of the resources that we have poured into this case, is unable to make any better case than this" (Tr. 155-156).

The nature of the research effort involved is indicated by Petitioner's Exhibit P-3 (Tr. 25-27, 57), the instructions to the field researchers. Those instructions include the following, at pp. 4-6:

> "Whether the work is done by a single researcher or divided among more than one, the course of investigation of any specific case will ordinarily involve the following steps:
>
> "(1) Inspection of the county court docket books for entries relating to the case.
>
> "(2) Inspection of all other records relating to the case available at the county court: file jackets, transcripts, witness blotters, letter files, pre-sentence reports.
>
> "(3) Inspection of appellate court records in any case where appeal was taken. Appellate court records include the docket of the appellate court, its file jacket, record on appeal (if

chastity, Tr. 79.) Notwithstanding respondent's pre-trial concession of the accuracy of the field researchers' re-

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maintained on file in the appellate court), court opinion or opinions if any, and appellate court clerk's letter file.

"(4) Inspection of prison records of the defendant if he was incarcerated in a prison which maintains records.

"(5) Inspection of pardon board records in any case where the defendant submitted any application for executive clemency.

"(6) If the foregoing sources fail to provide sufficient information to complete the schedule on the case, interview of defense counsel in the case.

"(7) If the foregoing sources fail to provide sufficient information to complete the schedule on the case, inspection of local and area newspaper files for items pertaining to the case.

"Three general directives should be kept in mind:

"(A) We are concerned with the sentencing decision, in each case, of a particular official body at a particular time (i.e., the trial judge or jury; the pardon board). Every such body acts—can act—only on the facts known to it at the time it acts. For this reason, the "facts" of a case called for by the schedule mean, so far as possible, the facts perceived by the sentencing body. Facts which we know to have been known to the sentencing body are preferred facts, and sources which disclose them are preferred sources. (A trial transcript, where it exists, is therefore the most desirable source of facts.) Other sources are of decreasing value as the likelihood decreases that the facts which they disclose were known to the sentencing body. (A newspaper story which purports to report trial testimony, therefore, is to be preferred to one which purports to report the facts of the offense on the basis of other sources of information.)

"(B) After this survey is completed, its results will be made the basis for allegations of fact in legal proceedings. If the allegations are controverted, it will be necessary to prove them, and the proof will have to be made within the confines of ordinary evidentiary rules, including the hearsay principle, best evidence rule, etc. For this reason, sources of facts which are judicially admissible evidence to prove the facts which they disclose are preferred sources. Official records are most desirable in this dimension; then the testimony of witnesses having knowledge of the facts (for example, defense counsel), finally, secondary written sources (for example, newspapers).

sponses on the individual case schedules, including the response "unknown" where that appeared (see note 10 *supra*), counsel for respondent attempted to suggest in cross-examination of Dr. Wolfgang that these gaps in information impugned the underlying data-gathering process. Dr. Wolfgang replied:

> "the absence of information, I would be unwilling to assert is due to lack of any effort. Very diligent efforts were made by the field-investigators to collect the information—from court clerks, from police records, from prisons, from other sources available in the community—and they were instructed to follow down each piece of information, each source of information to its fullest extent, so that I have no reason to doubt that the effort was made to collect the data" (Tr. 80).

Wherever an official record or document may contain pertinent information, inspect it yourself if you can; don't take somebody's word for what is in it.

"(C) Many of the facts you need to know will have been contested in the judicial and post-judicial proceedings leading to a defendant's sentence and its execution. We have no method for resolving factual disputes or, ordinarily, for knowing how the triers of fact resolved them. As an invariable rule, then, the facts should be reported in the light most favorable to the prosecution, and most unfavorable to the defendant, in every case. If a trial transcript exists, and if it contains the testimony of the complaining witness and of the defendant, resolve all conflicts of testimony in favor of the complaining witness and report the facts as they might reasonably have been found by a jury which credited the complaining witness, drew all rational inferences from her testimony most strongly against the defendant, discredited the defendant, and refused to draw any disputable inferences in his favor. Treat all other sources in a similar fashion. In interviews with defense counsel, try to impress upon counsel that you have to have the facts as they might have appeared in the worst light for his client. In reading newspaper items which give conflicting versions of the facts, adopt the version most unfavorable to the defendant."

His testimony as a whole makes it clear that—although, as he put it: "Information is always limited" (Tr. 72)—he was confident that he had enough of it to support his conclusions. (See particularly Tr. 76-79.)

He was able to subject twenty-two "quite relevant variables" (Tr. 78)—in addition to race of defendant, race of victim, and sentence—to analysis. (See Petitioner's Exhibit P-4, Appendix A; Tr. 29, 52.) Most of these were not significantly associated with sentence, and so Dr. Wolfgang could assert categorically that they did not account for or explain the disproportionately frequent death sentencing of Negroes with white victims (Tr. 42-46, 53-54). These variables included the defendant's age, whether he was married, whether he had dependent children, whether he had a prior criminal record; the victim's age, whether she had dependent children; whether the defendant and victim were strangers or acquaintances prior to the offense; place where the offense occurred (indoors or outdoors), whether the defendant committed an unauthorized entry in making his way to that place; whether the defendant displayed a weapon in connection with the offense; degree of seriousness of injury to the victim; and the defendant's plea (guilty or not guilty), type of counsel (retained or appointed), and duration of trial (Tr. 47, 53; Petitioner's Exhibit P-4, p. 9, para. 5; Petitioner's Exhibit P-5). Two variables were shown to bear significant association with sentence: death sentences were more frequent in the cases of defendants who had a prior record of imprisonment, and in the cases of defendants who committed other offenses contemporaneously with the rape. But because these variables were not associated with race,[11] Dr. Wolfgang con-

[11] Statistical analysis of the association between these variables and race of the defendant disclosed no significant association. When defendant-victim racial combinations were considered, the

cluded that they also could not account for the fact that Negroes convicted of rape of white victims were disproportionately often sentenced to death (Tr. 47-52, 54; Petitioner's Exhibit P-4, pp. 8-9, para. 4; Petitioner's Exhibit P-5). Other variables appeared so frequently or so infrequently in the total population of cases studied that statistical analysis of them was "unnecessary and impossible": the fact that they appeared to characterize all cases (or no cases), irrespective of sentence or of racial combinations of defendant and victim, pointed to the conclusion that they were not available explanations for the relationship observed between death sentences and Negroes with white victims. These variables included the victim's reputation for chastity and prior criminal record; whether the defendant and victim had had sexual relations prior to the occasion of the rape; the degree of force employed by the defendant; whether the victim was made pregnant by the rape; and whether the defendant interposed a defense of insanity at trial (Tr. 54-55, 94-95, Petitioner's Exhibit P-5). Summarizing, Dr. Wolfgang found that no variable of which analysis was possible could account for the observed disproportionate frequency of sentencing to death of Negroes convicted of rape of white victims (Tr. 56-57). His ultimate conclusion was:

> "On the basis of the foregoing findings, it appears that Negro defendants who rape white victims have been disproportionately sentenced to death, *by reason of their race*, during the years 1945-1965 in the State of Arkansas." (Dr. Wolfgang's written report, Petitioner's Exhibit P-4, pp. 13-14 (emphasis added).)

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numbers of cases for which information was available became too small for statistical treatment, but on the basis of trend of association, Dr. Wolfgang concluded that here too there was no association of significance.

C. *The Opinions Below.*

1. The Issue of Racial Discrimination in Capital Sentencing for Rape.

Although respondent presented no evidence of any sort in rebuttal, the district court disagreed with Dr. Wolfgang's conclusions. It accepted his finding that the differential sentencing to death of Negroes with white victims. "could not be due to the operation of the laws of chance" (257 F. Supp. at 718; App. A, p. 16a *infra*); but supposed, again without any sort of evidentiary presentation by the State, that it might be due to some factor respecting which statistical analysis had not been possible, such as the issue of consent in rape cases (257 F. Supp. at 720-721; App. A, p. 21a *infra*). The Court remarked that the "variables which Dr. Wolfgang considered are objective . . . broad and in instances . . . imprecise"; that in many of the individual rape cases studied "the field workers were unable to obtain from available sources information which might have been quite pertinent"; and that "Dr. Wolfgang's statistics really reveal very little about the details" of comparative individual cases of rape. (257 F. Supp. at 720; App. A, p. 20a *infra*.) While recognizing that "the sample drawn by Mr. Monroe seems to have been drawn in a manner which is acceptable statistically" (257 F. Supp. at 720; App. A, p. 19a *infra*), the court noted that the counties randomly chosen had turned out not to be evenly geographically dispersed, and not to include many counties of sparse Negro population (*ibid.*). Garland County, which was not itself included in the sample, is a county of sparse Negro population located in a portion of the State in which the sample counties fell less frequently than elsewhere. For those reasons, the district court declined to conclude that "the Garland County jury which tried petitioner was motivated by racial discrimination when it failed to assess a punish-

ment of life imprisonment" (257 F. Supp. at 719; App. A, p. 18a *infra*)—(a subjective proposition, parenthetically, which petitioner's counsel had explicitly disavowed any intention to undertake to prove). With regard to the State of Arkansas generally, the district court thought that the "cases studied, and the number of death sentences imposed are simply too few in number to afford convincing proof" of racial discrimination (257 F. Supp. at 720; App. A, p. 19a *infra*). Placing some reliance on the language in Dr. Wolfgang's written report to the effect that the report was "preliminary" and "tentative" (257 F. Supp. at 720; App. A, p. 20a *infra*), the court concluded:

> "On the meager material before it the Court is simply not prepared to convict Arkansas juries of unconstitutional racial discrimination in rape cases. As a matter of fact, the Court doubts that such discrimination, which is a highly subjective matter, can be detected accurately by a statistical analysis such as was undertaken here. Statistics are elusive things at best, and it is a truism that almost anything can be proved by them." (257 F. Supp. at 720; App. A, pp. 20a-21a *infra*.)

This conclusion appears to rest upon rejection of petitioner's contention that the principle of a *prima facie* showing of discrimination, developed by this Court in jury-exclusion cases and in other cases where factual proof of racially discriminatory conduct is material, applies also to the proof of racially discriminatory sentencing. Specifically, petitioner urged in the district court that a showing of racially differential treatment, made by a rigorous and exhaustive statistical study such as Dr. Wolfgang's, which concluded under accepted scientific standards that Negroes were being markedly more frequently sentenced

to death than whites, in a fashion that could not be accounted for on any other ground than race, constituted a *prima facie* demonstration of discrimination, compelling a finding of discrimination in the absence of any rebuttal or explanation by the State.[11] The district court's opinion does not expressly speak to this contention, but its findings make apparent its rejection of the *prima facie* principle. The court consistently speaks in terms of petitioner's failing to carry the burden of proof of discrimination.[12] And although, as we have seen, it accepts Dr. Wolfgang's conclusion that Negroes have been differentially sentenced to death in numbers that "could not be due to the operation of the laws of chance" (257 F. Supp. at 718; App. A, p. 16a *infra*), the court—notwithstanding total failure of the State to rebut or explain this differential—declines to find discrimination.

The Court of Appeals for the Eighth Circuit unequivocally rejected petitioner's contention "that a prima facie

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[11] "Under these circumstances, we suggest that where, first of all, a showing has been made that the death penalty is disproportionately frequently applied to Negroes and, secondly, an attempt has been made exhaustively to find every detail and every condition that will account for that discrimination, and every condition that could be analyzed was analyzed and shown not to account for that discrimination, and where your failure to account for other circumstances arises from the fact data is unavailable from state records, that we have amply made out a prima facie case." (Tr. 156; see Tr. 155-157.)

[12] "The cases studied, and the number of death sentences imposed are simply too few in number to afford convincing proof of the proposition urged by petitioner.

* * *

The Court is simply not prepared to convict Arkansas juries of unconstitutional racial discrimination.

* * *

the Court is simply not convinced . . ." (257 F. Supp. at 720; App. A, pp. 20a-21a *infra*.)

case of racially discriminatory imposition of the death penalty for rape in Arkansas has now been established and remains unrebutted by the State." (App. A, p. 25a *infra*; see pp. 38a-39a *infra*.) Again the rejection appears bottomed upon a holding that the *prima facie* principle is inapplicable. Dr. Wolfgang's findings, the court notes, "do not deny that generally the burden of demonstrating discrimination in penalty imposition is on the one who asserts it." (App. A, p. 41a *infra*.) Petitioner has not carried that burden, in the court's view, for several reasons. "Like the trial court, . . . although perhaps not for each and all of the reasons it advanced, we feel that the [statistical] argument does not have validity and pertinent application to Maxwell's case." (App. A, p. 40a *infra*.)

The court of appeals, in general, appears to concede the general validity of Dr. Wolfgang's methodology, and even of his conclusion that a pattern of racial discrimination has been shown. It finds that Dr. Wolfgang testified his report was "preliminary" only "in the sense that the other states for which data was being collected would be included in the final report." (App. A, pp. 33a-34a *infra*.) And the court accepts that there are "recognizable indicators" "that the death penalty for rape may have been discriminatorily applied over the decades in that large area of states whose statutes provide for it."[11] Nevertheless the court holds, in effect, that this statistical showing of discrimination is irrelevant because it does "not show that the

[11] App. A, p. 44a, *infra*. Despite the generality of the court's language, this finding must relate specifically to the State of Arkansas. This is so because no proof was offered on this record of the results of the Wolfgang study in other States. The only evidence of record with regard to areas outside Arkansas was Petitioner's Exhibit P-6, the National Prisoner Statistics. These show raw numbers of executions for rape and murder, by race, for all the States. (See pp. 22-23, *supra*.) They purport to do no more than show that Dr. Wolfgang's conclusions for Arkansas are conformable to the national pattern.

petit jury which tried and convicted Maxwell acted in his case with racial discrimination" (App. A, p. 41a *infra;* see pp. 41a-45a *infra*):

> "[W]hatever . . . suspicion it may arose [sic] with respect to southern interracial rape trials as a group over a long period of time, and whatever it may disclose with respect to other localities, we feel that the statistical argument does nothing to destroy the integrity of Maxwell's trial." (App. A, pp. 42a-43a *infra.*)

This is so because the Arkansas statistics "do not relate specifically to Garland County where this particular offense was committed and where Maxwell was tried and convicted." (App. A, p. 40a *infra.*)

> "[W]hile it is true that it is in a sense the state which prosecutes, nevertheless the county has a character, too. . . . Yet the Garland County statistics [produced in the earlier habeas corpus proceeding] . . . afford no local support to the petitioner's statistical argument. The evidence produced at the prior hearing and at this one discloses only Maxwell as a recipient of the death penalty in Garland County for rape.
>
> ". . . [W]e are not yet ready to nullify this petitioner's Garland County trial on the basis of results generally, but elsewhere, throughout the South." (App. A, p. 42a *infra.*)

In addition, the court of appeals attacked the "legal logic" of any argument which would make it constitutionally impossible for a Negro to receive the death penalty upon conviction of rape of a white woman, while white men were still theoretically subject to the death penalty for rape. (App. A, p. 43a *infra.*) The court said that this result would itself constitute a violation of the Constitution and that "it is the law, not probabilities or possibilities, which

must afford equal protection." (App. A, p. 44a *infra*.) In all, the court concluded: "We are not certain that, for Maxwell, statistics will ever be his redemption. . . ." (App. A, p. 44a *infra*.)

2. The Issues of Unfettered Jury Discretion and of Simultaneous Trial on Guilt and Punishment.

Petitioner's related claims attacking Arkansas' capital sentencing procedure on its face were likewise rejected on the merits by the district court and the court of appeals. As to the contention that the unguided and uncontrolled discretion given juries under Arkansas law to decide the question of life or death is fundamentally lawless and unconstitutional within the principle of *Giaccio* v. *Pennsylvania*, 382 U.S. 399 (1966), both courts below relied on a footnote in the majority's *Giaccio* opinion: "we intend to cast no doubt whatever on the constitutionality of the settled practice in many states to leave to juries finding defendants guilty of a crime the power to fix punishment within legally prescribed limits." (382 U.S. at 405, n. 8; see 257 F. Supp. at 717; App. A, pp. 13a-14a *infra*; App. A, pp. 48a-49a *infra*.) The court of appeals found support also in this Court's statement in *Spencer* v. *Texas*, 385 U.S. 554, 560 (1967), that it was not there "contended that it is unconstitutional for the jury to assess the punishment to be meted out to a defendant in a capital or other criminal case." (App. A, p. 48a *infra*.)

With respect to the claim that, where jury sentencing is authorized, the Fifth and Fourteenth Amendments require some procedure for separate adjudication of the issues of guilt and capital punishment, the district court concluded that "[w]hile some States follow that procedure, this Court does not believe . . . the Constitution requires it." (257 F. Supp. at 721; App. A, p. 22a *infra*.) The court of appeals noted that it had rejected similar arguments in *Pope* v.

United States, 372 F.2d 710, 727-30 (8th Cir. 1967), *judgment vacated on other grounds*, 392 U.S. 661 (1968), and found support again in the *Spencer* v. *Texas* opinion, 385 U.S., at 568 (1967):

> "Two-part jury trials are rare in our jurisprudence; they have never been compelled by this Court as a matter of constitutional law, or even as a matter of federal procedure." (App. A, pp. 49a-50a *infra*.)

3. The Issue of Racially Discriminatory Jury Selection Procedures.

The district court refused to consider petitioner's renewed attack on Arkansas' jury selection procedures, that is, the claim that use of racially segregated taxpayer rolls impermissibly invited the systematic exclusion of Negroes. The issue was thought to be foreclosed by petitioner's prior federal habeas corpus adjudication. (257 F. Supp. at 713; App. A, pp. 4a-5a *infra*.) The court of appeals rejected petitioner's argument on the merits, on the ground that in Maxwell's case the jurors were not *directly* selected from racially designated elector lists; instead jury lists were initially prepared independently, and only subsequently checked out against racially designated elector lists. Further, the court pointed out, in Maxwell's case there was no claim of inappropriate Negro representation on the Garland County jury list, nor any claim of Negro exclusion, and there was a Negro jury commissioner. On these grounds the court distinguished *Whitus* v. *Georgia*, 385 U.S. 545 (1967), and this Court's several decisions following *Whitus*. (App. A, pp. 50a-54a *infra*.)

REASONS FOR GRANTING THE WRIT

I.

Petitioner's Uncontradicted Proof of Racially Discriminatory Imposition of the Death Penalty on Negroes Convicted of Raping White Women, Together with the Needless Encouragement of Discriminatory Sentencing Occasioned by the Arkansas Procedure of Simultaneously Submitting the Issues of Guilt and Punishment to a Jury Without Standards to Guide its Discretion in Fixing Punishment, Requires Reversal of the Judgment Below.

Introduction

The issues raised by this petition are of enormous contemporary importance.[15] The Court is here presented for the first time with a record that is the end product of a detailed and exhaustive examination of the practical results of the procedures used in making the decision whether a man should live or die. That record graphically demonstrates the grim consequences of leaving unfettered and uninformed discretion to juries to choose between death

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[15] See *Sims* v. *Georgia*, 384 U.S. 998 (1966), where among the questions this Court granted certiorari to review was the following:

> Where a Negro defendant sentenced to death in Georgia for the rape of a white woman offers to prove that nineteen times as many Negroes as whites have been executed for rape in Georgia in an effort to show that racial discrimination violating the equal protection clause of the Fourteenth Amendment produced such a result, may this offer of proof be disallowed?

The case was decided on a different ground, *Sims* v. *Georgia*, 385 U.S. 538 (1967); *Sims* v. *Georgia*, 389 U.S. 404 (1967).

and lesser penalties for rape in a state which has historically practiced racial discrimination.[14]

The coincidence of laws maintaining the death penalty for rape, of procedures which allow its imposition arbitrarily, and of racial discrimination in its actual administration is not, of course, accidental. Sixteen American States retain capital punishment for rape. Nevada permits imposition of the penalty only if the offense is committed with substantial bodily harm to the victim.[15] The remaining fifteen jurisdictions—which allow their juries absolute discretion to punish any rape with death—are all southern or border states.[16] The federal jurisdiction

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[14] Just recently the application of a Negro man and white woman for a marriage certificate was denied by the clerk of Pulaski County, Arkansas, on the basis of an Arkansas statute prohibiting interracial marriage. The couple was forced to go to a federal court for an order declaring the statute unconstitutional under *Loving* v. *Virginia*, 388 U.S. 1 (1967), and ordering the county clerk to entertain their application. *Higgins* v. *Peters*, U.S. District Court No. LR-68-C-176, E.D. Ark., Sept. 25, 1968.

[15] Nev. Rev. Stat. §200.363 (1967). See also §200.400 (1967) (assault with intent to rape, accompanied with acts of violence resulting in substantial bodily harm).

[16] The following sections punish rape or carnal knowledge unless otherwise specified. Ala. Code §§14-395, 14-397, 14-398 (Recomp. Vol. 1958); Ark. Stat. Ann. §§41-3403, 43-2153 (1964 Repl. Vols.); see also §41-3405 (administering potion with intent to rape); §41-3411 (forcing marriage); Fla. Stat. Ann. §794.01 (1964 Cum. Supp.); Ga. Code Ann. §§26-1302, 26-1304 (1963 Cum. Supp.); Ky. Rev. Stat. Ann. §435.090 (1963); La. Rev. Stat. Ann. §14:42 (1950) (called aggravated rape but slight force is sufficient to constitute offense; also includes carnal knowledge); Md. Ann. Code §27-463 (1967 Cum. Supp.); see also §27-12 (assault with intent to rape); Miss. Code Ann. §2358 (Recomp. Vol. 1956); Vernon's Mo. Stat. Ann. §559.260 (1953); N.C. Gen Stat. §14-21 (Recomp. Vol. 1953); Okla. Stat. Ann. Tit. 21, §§1111, 1114, 1115 (1958); S.C. Code Ann. §§16-72, 16-80 (1962) (includes assault with attempt to rape as well as rape and carnal knowledge); Tenn. Code Ann. §§39-3702, 39-3703, 39-3704, 39-3706 (1955); Tex. Pen.

and the District of Columbia, with its own strong southern traditions, also allow the death penalty for rape.[19] Outside the United States, rape is punishable by death only in Malawi, Taiwan, and the Union of South Africa.[20]

Between 1930 and 1962, the year in which petitioner was sentenced to die, 446 persons were executed for rape in the United States.[21] Of these, 399 were Negroes, 45 were

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Code Ann. arts. 1183, 1189 (1961); Va. Code Ann. §18.1-44 (Repl. Vol. 1960), see also §18.1-16 (attempted rape).

[19] 18 U.S.C. §2031 (1964); 10 U.S.C. §920 (1964); D.C. Code Ann. §22-2801 (1961).

[20] United Nations, Department of Economic and Social Affairs, Capital Punishment (ST/SOA/SD/9-10) (1968), pp. 40, 86.

[21] The figures below are taken from United States Department of Justice, Bureau of Prisons, National Prisoner Statistics, No. 32, *Executions*, 1962 (April, 1963), which was put in evidence as petitioner's Exhibit P-6 at the habeas corpus hearing. Table 1 thereof shows the following executions under civil authority in the United States between 1930 and 1962:

MURDER

	Total	*White*	*Negro*	*Other*
Number	3298	1640	1619	39
Per Cent	100.0	49.7	49.1	1.2

RAPE

	Total	*White*	*Negro*	*Other*
Number	446	45	399	2
Per Cent	100.0	10.1	89.5	.04

OTHER OFFENSES

	Total	*White*	*Negro*	*Other*
Number	68	37	31	0
Per Cent	100.0	54.4	45.6	0.0

whites and 2 were Indians. All were executed in Southern or border States or the District. The percentages—89.5% Negro, 10.1% white—are revealing when compared to similar racial percentages of persons executed during the same years for murder and other capital offenses. Of the total number of persons executed in the United States, 1930-1962, for murder, 49.1% were Negro; 49.7% were white. For other capital offenses, 45.6% were Negro; 54.4% were white. Louisiana, Mississippi, Oklahoma, Virginia, West Virginia and the District of Columbia never executed a white man for rape during these years. Together they executed 66 Negroes. Arkansas, Delaware, Florida, Kentucky and Missouri each executed one white man for rape between 1930 and 1962. Together they executed 71 Negroes. Putting aside Texas (which executed

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Table 2 thereof shows the following executions under civil authority in the United States between 1930 and 1962, for the offense of rape, by State:

	White	*Negro*	*Other*
Federal	2	0	0
Alabama	2	20	0
Arkansas	1	17	0
Delaware	1	3	0
District of Columbia	0	2	0
Florida	1	35	0
Georgia	3	58	0
Kentucky	1	9	0
Louisiana	0	17	0
Maryland	6	18	0
Mississippi	0	21	0
Missouri	1	7	0
North Carolina	4	41	2
Oklahoma	0	4	0
South Carolina	5	37	0
Tennessee	5	22	0
Texas	13	66	0
Virginia	0	21	0
West Virginia	0	1	0
	45	399	2

13 whites and 66 Negroes), sixteen Southern and border States and the District of Columbia between 1930 and 1962 executed 30 whites and 333 Negroes for rape; a ratio of better than one to eleven.

What is in question here is the essential fairness, regularity and even-handedness required by the Constitution in proceedings by which the State determines to take human life. As this Court noted in *Witherspoon* v. *Illinois*, 391 U.S. 510 (1968), history and the public temper in this country today appear to have set their heads against capital punishment. There were only two executions in the United States during the calendar year 1967 and only one in 1966.[22] Most significantly, there has not been a single

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[22] United States Department of Justice, Bureau of Prisons, National Prisoner Statistics, No. 42, *Executions* 1930-1967 (June 1968), p. 1. For discussion of the decreasing trend in executions, see UNITED NATIONS, DEPARTMENT OF ECONOMIC AND SOCIAL AFFAIRS, CAPITAL PUNISHMENT, note 20, *supra*; SELLIN, THE DEATH PENALTY (1959), published as an appendix to American Law Institute, Model Penal Code, Tent. Draft No. 9 (May 8, 1959); MATTICK, THE UNEXAMINED DEATH (1966); Hartung, *Trends in the Use of Capital Punishment*, 284 ANNALS 8 (1952).

In *Witherspoon* v. *Illinois*, 391 U.S. 510, 519-20 (1968), this Court noted that "in a nation less than half of whose people believe in the death penalty, a jury composed exclusively of such people cannot speak for the community. . . . [S]uch a jury can speak only for a distinct and dwindling minority." The opinion cited public opinion polls indicating that in 1966 approximately 42% of the American public favored capital punishment for convicted murderers, while 47% opposed it and 11% were undecided. Polls, International Review on Public Opinion, Vol. II, No. 3, at 84 (1967).

Concerned private and public agencies have also turned increasingly against the death penalty. The influential National Council on Crime and Delinquency recommended abolition in 1963. See 9 CRIME AND DELINQUENCY 225 (1963). The United States Department of Justice has taken the same view:

> "We favor the abolition of the death penalty. Modern penology with its correctional and rehabilitative skills affords greater protection to society than the death penalty which is inconsistent with its goals. This Nation is too great in its

execution for rape since 1964.[23] Rather than making the questions presented here less momentous, this trend only makes especially vivid the bitter irony of petitioner's predicament. If the death penalty, especially for rape, is to be a rarely imposed sanction, an unusual, extreme resort of our society, see, e.g., WECHSLER, *The Urge to Punish* 163-165 (1956), it is imperative that the resort be invoked only under procedures which assure against arbitrary and discriminatory fortuity, and that the men chosen to die be rationally and fairly chosen. The most solicitous judicial concern should be devoted to assure, at the least, that race plays no part in their selection.

Petitioner makes three interrelated constitutional challenges to the Arkansas procedure by which he was sentenced to death. First, he contends that the Arkansas practice which leaves "jurors free to decide, without any legally fixed standards,"[24] the question of life or death violates the basic rule of law implicit in the Due Process Clause. The potential for arbitrary and discriminatory application of the death penalty in the jury's unguided, unregulated and unreviewable discretion is exacerbated by a second characteristic of Arkansas procedure: simultane-

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resources and too good in its purposes to engage in the light of present understanding in the deliberate taking of human life as either a punishment or a deterrent to domestic crime." (Letter from then Deputy Attorney General Ramsey Clark to the Honorable John L. McMillan, Chairman, House Committee on the District of Columbia, July 23, 1965, reported in New York Times, July 24, 1965, p. 1, col. 5.)

The Attorney General reiterated his stand against capital punishment when he was nominated for the post. See *N. Y. Times Magazine*, Sunday, April 2, 1967, pp. 31, 139.

[23] United States Department of Justice, Bureau of Prisons, National Prisoner Statistics, No. 42, Executions 1930-1967 (June, 1968), p. 7.

[24] *Giaccio v. Pennsylvania*, 382 U.S. 399, 402-403 (1966).

ous trial and submission to the jurors of the issues of guilt and punishment, a procedure which deprives the capital sentencing body of the sort of background information that is indispensable to any sort of rational choice, including the defendant's history and his personal statement, except at the cost of prejudice to fair trial on the guilt question and enforced waiver of the defendant's privilege against self-incrimination.[25] Thirdly, petitioner has documented the ugly results of the Arkansas procedures which he challenges. In the uncontested expert opinion of one of the country's outstanding criminologists, based upon an exhaustive, costly, and rigorous scientific study, Arkansas juries in rape cases have responded to the state-given opportunity for arbitrariness and have discriminated on grounds of race in sentencing men to death.

Neither court below considered the statistical showing of discrimination adequate as a matter of law, but we emphasize that there was no dispute on the facts; no

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[25] Similar procedures are being challenged in other cases before the Court this term. *Johnson v. Virginia*, Misc. No. 307; *McCants v. Alabama*, Misc. No. 937; *Porcella v. New Jersey*, Misc. No. 947. They are also under challenge in cases maintained on behalf of hundreds of condemned men in the lower courts, including the actions which have resulted in class stays of execution for all men under a sentence of death in the States of California and Florida. Many of these cases are collected and described in the Brief Amici Curiae of the N.A.A.C.P. Legal Defense and Educational Fund, Inc., and the National Office for the Rights of the Indigent, in *Witherspoon v. Illinois*, O.T. 1967, No. 1015, and *Bumper v. North Carolina*, O.T. 1967, No. 1016, at pp. 12-15, n. 30. Fifty-one men are affected alone by the stay in *Adderly v. Wainwright*, M.D. Fla., No. 67-298-Civ-J; eighty-three men and one woman by the stay in *Application of Satterfield*, Cal. S.C., Crim. No. 11573, and *Application of Anderson*, Cal. S.C., Crim. No. 11572.

Like Arkansas, most of the States which authorize the death penalty grant the jury absolute, arbitrary discretion to impose the death penalty in a single-verdict proceeding. Thus the lives of the vast majority of the 500 men now on death row in the United States will be affected by the Court's decision in this case.

evidence at all, much less conflicting expert opinion, was presented by the State, although it had full opportunity. Moreover, the court of appeals conceded that there were "recognizable indicators" "that the death penalty for rape may have been discriminatorily applied over the decades in that large area of states whose statutes provide for it." (App. A, p. 68a *infra*.) This finding surely requires the most painstaking consideration by this Court of the legal issues involved in Maxwell's case. For any such finding, impugning the fairness of administration of the death penalty—any such "suspicion . . . with respect to southern interracial rape trials as a group over a long period of time" (App. A, pp. 42a-43a *infra*)—touches at its roots a complex of our most intractable contemporary social issues.

Decisions of this Court have long recognized that violence may emanate from the state as well as from the mob, and that violence under color of law is as dangerous to the social fabric as that not cloaked with legitimate authority.* When government acts unlawfully, the simple result is contempt for law. See Mr. Justice Brandeis, dissenting, in *Olmstead v. United States*, 277 U.S. 438, 485 (1928). A second consequence, no less serious though rarely recognized, is the fostering in a society of the tendency to accept violence which is perpetrated by legitimate authority as broadly necessary and justifiable.

Execution, though carried out with the imprimatur of the state, is an extreme form of violence by government. One need not assert its illegality under all circumstances to point out that putting a man to death against his will

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* *See, e.g., Moore v. Dempsey*, 261 U.S. 86 (1923); *Mooney v. Holohan*, 294 U.S. 103 (1935); *Brown v. Mississippi*, 297 U.S. 278 (1936); *Rochin v. California*, 342 U.S. 165 (1952); *Shepherd v. Florida*, 341 U.S. 50 (1951) (Mr. Justice Jackson, concurring). Cf. *Lankford v. Gelston*, 364 F.2d 197, 203-205 (4th Cir. 1966).

is state-sanctioned violence which may have the same significant consequences as other forms of official violence. It is in this context that this Court should decide the questions raised here of disproportionate application of the death penalty to Negroes as a class, and procedures that permit this disproportion. For if, as the available evidence demonstrates, the state is reserving a violent punishment for one racial group, then government is condoning for society in general, and for that class in particular, the most corrosive sort of discrimination in the most vicious and least pardonable form of human conduct. Many distinctions in government policy may be justified or accepted even when invidious and even by those who are members of the disfavored class. But discriminatory violence on the part of the state is a course which the group that is discriminated against can hardly be expected to accept. Unequal sentencing on the basis of race can only contribute to smoldering resentment or sterile indifference on the part of the oppressed class. The sense which many Negroes undeniably have and which the evidence here confirms, that the death penalty in rape cases is reserved for Negroes convicted of an offense in which a white woman is the victim, is part of the social and psychological constellation which produces "untoward counter reactions of violence". Cf. *Lankford v. Gelston*, 364 F.2d 197, 204 n. 7 (4th Cir. 1966) (Sobeloff, J.)

The submission which follows is firmly rooted in principles of law basic to our constitutional system. The factual showing is the product of an especially rigorous and thorough application of accepted scientific methodology. But as we see the matter, the enormous consequences in disaffection and alienation caused by such sentencing patterns as are here revealed enhance the weight and depth of the issues presented and make them as vital to society as they are to William Maxwell.

We add, finally, that this case does not come here alone. Litigations pending in the lower courts on behalf of hundreds of condemned men raise the same challenges which Maxwell now makes to the procedures under which he and they were sentenced to die. Several pending petitions for certiorari raise these points. See note 25 *supra*. But on no record of which we are aware are the consequences of the procedures so graphically displayed. Negro men condemned to death for rape are now raising Maxwell's racial discrimination point, based on the Wolfgang study, in a number of States.[27] But the approach to the study taken by the court below—skepticism regarding the validity of all statistical proof; insistence that particular counties, rather than States, be shown to discriminate; finally, the legal conclusion that even a conceded showing of racially discriminatory sentencing cannot prevail because "it is the law, not probabilities or possibilities, which must afford equal protection" (App. A, p. 44a *infra*)—doom those other men along with Maxwell. The import of the decision below is plain: racial discrimination in capital sentencing, not worked on the face of a State's statute books but none the less demonstrably by its juries, is irremediable. Thus, the Equal Protection Clause is rendered impotent to cure the Twentieth Century version of those discriminatory sentencing practices which were one of its most immediate targets,[28] and which are today one of our society's most grievous injustices. So that this result may not stand, we urge that certiorari be granted.

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[27] A number of cases in which the results of the Wolfgang study are being presented are now pending in Alabama, Florida, Georgia, Louisiana, and South Carolina. Descriptions of the study appear in *Matter of Sims and Abrams*, 389 F.2d 148 (5th Cir. 1967), and in the memorandum order of the Court of Appeals for the Fourth Circuit in *Moorer* v. *South Carolina*, 368 F.2d 458 (4th Cir. 1966).

[28] See pp. 45-47 *infra*.

A. *The Courts Below Erred in Holding That Petitioner's Proof of the Racially Discriminatory Death-Sentencing Practices of Arkansas Juries in Rape Cases Did Not Entitle Him to Relief From the Death Sentence.*

Although this Court has never expressly so held, it cannot be doubted that discriminatory application of the death penalty against Negro defendants convicted of the rape of white women would, if proved, constitute a denial to those defendants of the equal protection of the laws guaranteed by the Fourteenth Amendment. One of the cardinal purposes of the Fourteenth Amendment was the elimination of racially discriminatory criminal sentencing. The First Civil Rights Act of April 9, 1866, ch. 31, § 1, 14 Stat. 27, declared the Negroes citizens of the United States and guaranteed that "such citizens, of every race and color, . . . shall be subject to like punishment, pains, and penalties [as white citizens], and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding." The Fourteenth Amendment was designed to elevate the Civil Rights Act of 1866 to constitutional stature. See, e.g., tenBroek, *Thirteenth Amendment to the Constitution of the United States*, 39 CALIF. L. REV. 171 (1951); Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights*, 2 STAN. L. REV. 5 (1949). The Enforcement Act of May 31, 1870, ch. 114, §§ 16, 18, 16 Stat. 140, 144, implemented the Amendment by reenacting the 1866 act and extending its protection to all persons. This explicit statutory prohibition of racially discriminatory sentencing survives today as Rev. Stat. § 1977 (1875), 42 U.S.C. § 1981 (1964).

For purposes of the Fourteenth Amendment, it is of course immaterial whether a State writes on the face of its statute books: "Rape shall be punishable by imprisonment . . . , except that rape by a Negro of a white woman, or any other aggravated and atrocious rape, shall be pun-

ishable by death by electrocution," or whether the State's juries read a facially color-blind statute to draw the same racial line. Discriminatory application of a statute fair upon its face is more difficult to prove, but no less violates the State's obligation to afford all persons within its jurisdiction the equal protection of the laws. E.g., *Yick Wo* v. *Hopkins*, 118 U.S. 356 (1886); *Niemotko* v. *Maryland*, 340 U.S. 268 (1951) (alternative ground); *Fowler* v. *Rhode Island*, 345 U.S. 67 (1953); *Hamilton* v. *Alabama*, 376 U.S. 650 (1964) (per curiam).[39] And it does not matter that the discrimination is worked by a number of separate juries functioning independently of each other, rather than by a single state official. However it may divide responsibility internally, the State is federally obligated to assure the equal application of its laws. *Cooper* v. *Aaron*, 358 U.S. 1, 16 (1958).[40] This Court has long sustained claims of discriminatory jury exclusion upon a showing of exclusion continuing during an extended period of years, without in-

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[39] It is also immaterial whether a State imposes different penalties for classes of cases defined in terms of race, or whether it imposes a penalty of death in all cases of a given crime, subject to an option in the jury to be lenient in some racially defined subclass of the cases. The Fourteenth Amendment's obligation of equality extends not only to those "rights" which a state is federally compelled to give its citizens, but also to any benefits the State may choose to give any class of them, however gratuitously. *Brown* v. *Board of Education*, 347 U.S. 483 (1954); *Watson* v. *City of Memphis*, 373 U.S. 526 (1963).

[40] Execution by the State of the death sentence which it has given juries unlimited discretion to impose clearly provides that "interplay of governmental and private action," *N.A.A.C.P.* v. *Alabama*, 357 U.S. 449, 463 (1958), quoted in *Anderson* v. *Martin*, 375 U.S. 399, 403 (1964), which makes the State responsible for the discrimination. *Shelley* v. *Kraemer*, 334 U.S. 1 (1948). Thus the State, the entity to which the Fourteenth Amendment applies, not Garland County, must answer for the discrimination. It should be noted moreover that in Arkansas as elsewhere, charging papers allege the commission of a crime "against the peace and dignity of the state of Arkansas" not against a given county.

quiry whether the same jury commissioners served throughout the period. See, *e.g.*, *Neal* v. *Delaware*, 103 U.S. 370 (1881); *Bush* v. *Kentucky*, 107 U.S. 110 (1882); *Hernandez* v. *Texas*, 347 U.S. 475 (1954). Congress, when it enacted the 1866 Civil Rights Act knowing that "In some communities in the South a custom prevails by which different punishment is inflicted upon the blacks from that meted out to whites for the same offense,"[31] intended precisely by the Act, and subsequently by the Fourteenth Amendment, to disallow such "custom" as it operated through the sentences imposed by particular judges and juries.[32]

So the question for the courts below—the inevitably critical question in enforcement of this critical constitutional guarantee—is one of factual proof: whether a claimant has made a sufficient showing of racially discriminatory sentencing *in fact*. For, of course, today no State in the Nation has explicit statutory provisions fixing different criminal penaltes for different races. Discrimination is practiced as a matter of usage, in the administration of the broad sentencing discretion allowed by law. It cannot be detected by reading the text of what a State says about criminal sentences, but only by examining what the State's authorized agents *do* when they come actually to pass the judgments that send men to prison or to death. For this reason, questions relating to the method of that examination, to the procedures by which racially discriminatory sentencing may be judicially proved as the precondition of constitutional relief, become of the utmost importance. The present case raises just such questions, of general and cru-

[31] Cong. Globe, 39th Cong., 1st Sess. 1758 (4/4/1866) (remarks of Senator Trumbull, who introduced, reported and managed the bill which became the act).

[32] See the text of the act *supra*; see also, e.g., Cong. Globe, 39th Cong., 1st Sess. 475 (1/29/1866), 1759 (4/4/1866) (remarks of Senator Trumbull).

cial application to those who would challenge sentencing practices that bear with discriminatory harshness on the Negro.

On two previous occasions—in the state courts of Arkansas, 236 Ark. 694, 701-02, 370 S.W.2d 113, 117-18, and in the federal courts, 229 F. Supp. 205, 216-17, 348 F.2d 325, 330-331—courts had held that petitioner Maxwell failed to prove his claim of racial discrimination by Arkansas juries in death sentencing for rape. On the first occasion his evidence—consisting of the available official statistics—was sparse but suggestive. On the second, when he persuaded the courts to permit subpoena of a few county court files, it was still more suggestive,[11] but not strong enough. If nothing else, petitioner's failure thus far to convince the courts by his proof demonstrates how difficult it is for Negro litigants generally, and for those without means particularly, to make "the law . . . see what all others see," *Brooks* v. *Beto*, 366 F.2d 1, 12 (5th Cir. 1966), citing *Bailey* v. *Drexel Furniture Co.*, 259 U.S. 20, 37 (1922). Now petitioner, with the aid of donated scientific resources far beyond his own financial command, has made every effort which rigorous scientific methodology could devise and an enormous, painstaking work of field research could carry out, to make "the law . . . see what all others see." Again the courts below held that this was not enough.

But the reasons given below *why* it is not enough establish, simply, that no amount of proof will ever be enough. The court of appeals was more or less explicit on the point:

[11] The evidence showed that in the three counties whose records petitioner was permitted to subpoena, Negroes were not substantially more frequently charged with or convicted of rape than whites. If that proof was projected state-wide, it gave added significance to the official figures showing that Arkansas had executed 19 Negroes and only 2 whites for rape between 1913 and 1963, see note 1 *supra*.

"We are not certain that, for Maxwell, statistics will ever be his redemption." (App. A, p. 44a *infra*.) Maxwell's proof was insufficient, both courts below held, *not* because he had failed to show convincingly that Negroes convicted of rape of white women were disproportionately frequently sentenced to death by Arkansas juries in numbers that "could not be due to the operation of the laws of chance." (257 F. Supp. at 718; App. A, p. 16a *infra*). The courts below accepted that conclusion. It was insufficient *not* because any non-chance, non-racial explanation for the notably over-frequent death sentencing of Negroes in interracial rape cases appears in the record. The State of Arkansas presented no evidence whatsoever to account for the disproportion; and not a shred of proof in the record suggests that there may exist any such explanation. And petitioner's proof was insufficient *not* because the thorough study on which he relied failed itself to make exhaustive efforts to seek out, in accepted scientific fashion, whatever evidence might disprove the inference of racial discrimination to which the disproportionate death sentencing of Negroes in interracial rape cases naturally (as well as scientifically) gives rise. The search for non-racial explanations in the data was pursued by methods and with energies which neither court below questioned.

The reasons for the failure of petitioner's showing of discrimination lie, rather, in several legal principles announced by the courts below for evaluating evidence of the sort which petitioner presented, and for adjudging petitioner's constitutional claim on a record of such evidence. These legal principles, we suggest, are erroneous, and should be reviewed and repudiated by this Court.

1. The district court threw the burden of persuasion on the factual question of discrimination fully upon the petitioner. Although its opinion does not speak directly

to the question, it thus tacitly rejected petitioner's contention that the *prima facie* evidence principle of the jury-exclusion cases applies to proof of racial discrimination in sentencing. See pp. 29-30 *supra*. The court of appeals approved this approach, insisting that "generally the burden of demonstrating discrimination in penalty imposition is on the one who asserts it" (App. A, p. 41a *infra*), and failing to accept Dr. Wolfgang's uncontradicted expert opinion of discrimination because his study did "not take every variable into account" (*ibid.*). But, as Dr. Wolfgang testified, and neither court below denied, the study did take into account every variable of which scientifically acceptable analysis was possible, upon the available data; and this was enough, in Dr. Wolfgang's expert judgment, to support his conclusion. The courts below demanded something more—apparently, the negativing of every possible, speculative non-discriminatory explanation for the extremely disproportioned death-sentencing figures.

However, this Court has stated that because of the Fourteenth Amendment's overriding purpose to secure racial equality, "racial classifications [are] 'constitutionally suspect,' . . . and subject to the most rigid scrutiny' . . ." *McLaughlin* v. *Florida*, 379 U.S. 184, 192 (1964). This principle has as its corollary that a sufficient initial showing of unequal treatment of the races is made, calling state procedures in question, whenever it appears that whites and Negroes are substantially disproportionately represented in groups of persons differently treated by those procedures; such a showing compels the inference that a State is drawing the racial line unless the state offers some justification in non-racial factors for the disproportion. E.g., *Norris* v. *Alabama*, 294 U.S. 587 (1935); *Hernandez* v. *Texas*, 347 U.S. 475 (1954); *Reece* v. *Georgia*, 350 U.S. 85 (1955); *Eubanks* v. *Louisiana*, 356 U.S. 584 (1958).

Nor has this *prima facie* evidence rule in cases involving racial inequality been restricted to jury discrimination cases. It has also been applied to education cases, *Chambers* v. *Hendersonville Board of Education*, 364 F.2d 189 (4th Cir. 1966);[10] *Johnson* v. *Branch*, 364 F.2d 177 (4th Cir. 1966); health discrimination cases, *Cypress* v. *Newport News Hospital Association*, 375 F.2d 648 (4th Cir. 1967); and voter discrimination cases, *United States* v. *Duke*, 332 F.2d 759, 765-66 (5th Cir. 1964). See also *Gomillion* v. *Lightfoot*, 364 U.S. 339 (1960); *Ogama* v. *California*, 332 U.S. 633 (1948).

Plainly a *prima facie* showing under this principle was made here.[11] Yet, with respondent having offered no rebuttal evidence, the courts below concluded, principally on the basis of supposed incompleteness in the data and of speculation concerning the effect of possible explanatory variables testable on the basis of more complete data, that discrimination was not shown. We submit this disposition was obviously wrong. Petitioner's evidence was indisputably substantial even if, as the courts below thought, factual matters which had escaped the dragnet

[10] In *Chambers*, the court said: "innumerable cases have clearly established the principle that under circumstances such as this where a history of racial discrimination exists, the burden of proof has been thrown upon the party having the power to produce the facts." 364 F.2d at 192.

[11] The court "understands Dr. Wolfgang's conclusion to be that a Negro man who is convicted of raping a white woman has about a 50 per cent chance of receiving a death sentence, regardless of the facts and circumstances surrounding the crime, whereas a man who is convicted of criminally assaulting a woman of his own race stands only about a 7½ per cent chance of receiving the death sentence." (257 F. Supp. at 719; App. A. p. 17a *infra*.) This, the district court agreed, was a "differential [that] could not be due to the operation of the laws of chance." (257 F. Supp. at 718; App. A. p. 16a *infra*.) Moreover, every possible explanation for the disproportion which Dr. Wolfgang's comprehensive study could identify and subject to analysis failed to account for the racial figures.

of the Wolfgang study made it less than conclusive. No reason appears why the *prima facie* evidence principle previously applied to other sorts of challenged discriminations should not be applied here. Certainly the State's resources for investigation are superior to petitioner's. A pauper, he has been forced to rely on this study whose limitations—whether or not they are significant—derived from the limitations of resources of its sponsors. The State of Arkansas hardly suffers from comparable limitations. Nor can it be thought that Arkansas' access to state records and to the personnel involved in state trials is more restricted than that of a Negro litigant attempting in a Southern State to obtain evidence relating to a claim of racial discrimination. Every justification for shifting the burden of persuasion to the State, as has been done in litigation of other issues of this sort, applies with evident force here.

2. The district court thought that it saw certain deficiencies in Dr. Wolfgang's study.[*] The court of appeals'

[*] Petitioner's contention that the district court committed manifest error both in its evaluation of the evidence and in the standard by which it judged the evidence, is discussed in detail in Petitioner's Brief on appeal to the Eighth Circuit, pp. 45-56.

Briefly, the district court declined to accept Dr. Wolfgang's findings in part because "The cases studied, and the number of death sentences imposed are simply too few in number to afford convincing proof of the proposition urged by petitioner." (257 F. Supp. at 720; App. A, p. 19a *infra*.) Its reference to the "number of death sentences imposed" expressly purports to take account of the fact that, among the individual rape trials studied, several defendants who had undergone more than one trial were included more than once. However, Dr. Wolfgang himself explained that it was the number of trials, rather than the number of defendants, that is statistically important for present purposes; each occasion on which an Arkansas jury sentences a Negro defendant to death for rape of a white woman, or sentences a defendant to life in a case involving other racial combinations, is an additional indication of the manner in which the Arkansas statute is being applied

opinion, by contrast, finds no specific flaws in Dr. Wolfgang's methods or his data; indeed, it appears to concede

(see Tr. 60, 62). As for the court's concern with the number of case studies *in toto*, this ignores that the whole purpose of the statistical analysis conducted by Dr. Wolfgang was to satisfy him—as, in his expert opinion, it did—that the generalizations drawn from the data could be reliably based on the number of cases observed. The district court's ultimate conclusion was that Dr. Wolfgang's study provides only "meager material" (257 F. Supp. at 720; App. A, p. 20a *infra*) on which to base conclusions. But, at least in the absence of any countervailing evidence or sound reason to discredit Dr. Wolfgang's own confidence in his analysis, the district court lacked basis in the record for thus discrediting conclusions that Dr. Wolfgang opined without expert contradiction were adequately sustainable under accepted scientific standards.

The district court's reliance on that portion of the witness's written report which characterized his findings as "preliminary" and "tentative" is clearly erroneous. Dr. Wolfgang stated expressly several times that his report was "preliminary" only in regard to the entire eleven-State survey, not as to the State of Arkansas itself (Tr. 50, 93-94). See App. A, pp. 33a-34a *infra*.

Similarly inadequate consideration was given by the district court to the conclusions of Mr. Monroe, the expert who conducted the sampling resulting in the selection of 19 Arkansas counties to be studied. While recognizing that the "sample drawn by Mr. Monroe seems to have been drawn in a manner which is acceptable statistically" (257 F. Supp. at 720; App. A, p. 19a *infra*), the court appears to have taken its own view that the counties were not relevantly chosen. The court seemed to regard differential Negro population of the various counties of the state—a differential which it noticed judicially—as critically affecting Mr. Monroe's conclusions. But, again, there is no evidence on which to base any such reasoning; the reasoning runs counter to Mr. Monroe's uncontradicted testimony regarding methodology acceptable within his profession; surely, the district court could not judicially notice that he was wrong on such a matter.

Finally, the district court laid great stress upon its untenable supposition that a factor not explored in the Wolfgang analysis for want of sufficient data—the "issue of consent" which "[i]n cases not involving inter-racial situations . . . *may be and frequently is very real*" but which "*from a factual standpoint is much less likely to be present in cases in which white women have been attacked by Negro men*" (257 F. Supp. at 720; App. A, p. 21a *infra*, emphasis added)—explained the racially disproportioned death sentencing observed. This is plainly the sheerest speculation

the general validity of his study. Although the court notes that the study did "not take every variable into account" (App. A, p. 42a *infra*), of course no study could; and the court in its lengthy opinion mentions no significant variables which were omitted by the study." Instead it endorses—albeit guardedly—the conclusions of the study that capital sentencing for rape has shown discriminatory "results generally, but elsewhere, throughout the South" endorses—albeit guardedly—the conclusions of the study (App. A, p. 42a *infra*) that it gives grounds for "suspicion . . . with respect to southern interracial rape trials as a group over a long period of time." (App. A, pp. 42a-43a *infra*) and that there are "recognizable indicators" "that the death penalty for rape may have been discriminatorily applied over the decades, in that large area of states whose statutes provide for it" (App. A, p. 41a *infra*). Vague and redundant as they are, these observations must, of course, relate to the State of Arkansas, since Arkansas is the only State concerning which the record offers any evidence to support them. See note 24 *supra*.

The Eighth Circuit's reason for rejecting petitioner's proof, then, lies apart from its refusal to apply the *prima facie* evidence principle primarily in its view that the Wolfgang study—indeed any such statistical study—can not be used to justify reversal of Maxwell's sentence because it cannot show that the particular jury which sentenced Maxwell discriminated. (See App. A, pp. 41a-42a *infra*.) No such showing was attempted by petitioner, and none could ever be possible. Subjective proof of discriminatory motivation by particular juries in particular

The Court apparently did not adopt the district court's notion, to be sure, that the accused was a potentially significant variable for which the study failed to account. It merely pointed out that in Maxwell's case there was no consent, and "what we are concerned with here is Maxwell's case and only Maxwell's case." (App. A, p. 42a *infra*.)

ular cases would be more incapable of proof even than subjective discrimination by jury commissioners or voting registrars. Where racially discriminatory behavior by those agencies is legally material, it has always been thought permissible to prove it by showing a long-standing pattern or practice of different treatment of Negroes and whites. The court of appeals erred in holding that the teachings of those cases were inapposite here.

3. The court of appeals also assigns some weight—it is unclear how much—to the circumstance that the Wolfgang study did not relate specifically to Garland County. (App. A, p. 40a *infra*.) "[W]hile it is true that it is in a sense the state which prosecutes, nevertheless the county has a character and a posture, too." App. A, p. 42a *infra*.) In this regard, it apparently approves the view of the district court (see 257 F. Supp. at 719, n. 9 and accompanying text; App. pp. 18a-19a *infra*; and see Tr. 90-91, 118-120, 122, 134-135), that it was incumbent upon petitioner to show racial discrimination by juries in Garland county, the county of his conviction, rather than by juries in the State of Arkansas as a unit. This, we submit, is a plain error of law. Its difficulty is not merely that it demands impossible proof—the number of cases in one county is never, in our experience, adequate to support statistical analysis—but that it requires irrelevant proof. It is the State of Arkansas, not Garland County, which has sentenced William Maxwell to death. It is the State, not the County, which is compelled by the Fourteenth Amendment to afford him the equal protection of the laws. It is the State whose statutes give its juries absolute discretion to send men to its electric chair. If juries in the State of Arkansas as a whole generally apply the State's vague and permissive capital punishment statute in such a manner as to effect discrimination against Negroes con-

victed of the rape of white women, the State's statute is invalid as applied to any member of the class discriminated against. The contrary holding below, we urge this Court to decide, is wrong.

4. The court of appeals concluded finally that it could not invalidate petitioner's death sentence upon statistical proof that a statute fair on its face was being discriminatorily applied, because "it is the law, not probabilities or possibilities, which must afford equal protection." (App. A, p. 44a *infra*.) Again, this is a legal, not a factual proposition, and it is clear error. It is well-established that the discriminatory application of statutes violates the State's obligation to afford all persons the equal protection of the laws no less than the application of statutes discriminatory on their face. If the constitutional guarantee of equal protection is to be preserved against "sophisticated as well as simple-minded modes of discrimination," *Lane* v. *Wilson*, 307 U.S. 268, 275 (1939), this must be the law; and findings of discriminatory application can and must be based on inferences from observed behavior. *E.g.*, *Yick Wo* v. *Hopkins*, 118 U.S. 356 (1886); *Norris* v. *Alabama*, 294 U.S. 587 (1935); *Gomillion* v. *Lightfoot*, 364 U.S. 339 (1960); *Whitus* v. *Georgia*, 385 U.S. 545, 605 n. 2 (1967). "In the matter of racial discrimination, statistics often tell much, and Courts listen." *Alabama* v. *United States*, 304 F.2d 583, 586 (5th Cir. 1962) (Brown, J.), *aff'd*, 371 U.S. 37 (1962). See Finkelstein, *The Application of Statistical Decision Theory to the Jury Discrimination Cases*, 80 Harv. L. Rev. 338 (1966).

However, the Eighth Circuit argued that if it once recognized that Negroes convicted of rape were being discriminatorily sentenced to death, the only remedy would be to absolve Negroes from the death penalty, leaving whites

still subject to it. This result, the court believed, would itself violate equal protection. (App. A, pp. 43a-44a *infra.*) Perhaps the short answer is that such an argument, if valid, would defeat any attempt by courts to enforce the Equal Protection clause against administrative or executive discrimination not expressly authorized by a state statute that can be invalidated *in globo.* Yet this Court was not deterred from prohibiting the discriminatory enforcement of an ordinance against Chinese in *Yick Wo* v. *Hopkins, supra,* by the circumstance that, immediately after the *Yick Wo* decision, whites but not Chinese—or, to be more precise, not *only* Chinese—could be prosecuted under the ordinance. The real point, of course, is that the premise of the court below is faulty; the dilemma posed, unreal. Once discrimination is shown the State is simply under an obligation to cease imposing the death penalty in a discriminatory fashion. A variety of remedies is open to it, ranging from elimination of the death penalty for all defendants to revision of the procedures by which the penalty is imposed so as to guard against discrimination. In any event, so soon as the fact of discrimination ceases, the State may kill whom it chooses. Arkansas' history, as shown in this record, indicates that it has almost never chosen to kill whites; but when it does, it may even-handedly kill Negroes as well.

5. The logic of the court of appeals' opinion, in short, would write an effective end to the Equal Protection Clause as a guarantor of enforceable rights in our times. We repeat the obvious: that those who discriminate today on grounds of race are the beneficiaries of considerable sophistication in the art, which has advanced since the days of the Black Codes. Racial distinctions no longer appear on the face of laws or regulations, and the practitioners of discrimination no longer overtly profess that

their principles of decision are racial—except, of course, where they rightly or wrongly believe that even professed discrimination cannot be legally thwarted, as, *e.g.*, *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961); *Evans v. Newton*, 382 U.S. 296 (1966). It is just this consideration, coupled with a realistic appreciation of the impossibility of extracting an admission of discrimination from the covert discriminator, that has led to this Court's development of the doctrine that a *prima facie* showing of discrimination can be made objectively and statistically.

If racial discrimination is truly to be eradicated from our public life, methods of proof must be developed and judicially accepted which appraise the consequences of race in a variety of institutional relationships—even the most complex. With deference, petitioner believes that the record before the Court in this case meets the highest standards; that the courts below committed manifest error in their appraisal of conceded facts and the legal principles which they announced as governing that appraisal; and that the questions presented by this petition therefore well merit review here by writ of certiorari.

B. *The Courts Below Erred in Holding That Arkansas' Procedure of Allowing Capital Juries Absolute, Uncontrolled and Arbitrary Discretion to Choose Between Punishments of Life or Death, Does Not Violate the Rule of Law Basic to the Due Process Clause of the Fourteenth Amendment.*

The discretion given Arkansas jurors to decide whether a man convicted of rape shall live or die is absolute, uncontrolled, and arbitrary. As the district court noted in this case:

> "It may be conceded that the Arkansas statutes dealing with rape and dealing with capital punishment do not purport to set up any standards by which the jury is to

> exercise its discretion [in capital sentencing] . . . and it will be assumed that no such standards are found in the reported decisions of the Supreme Court of Arkansas. Nor did the Circuit Court in its charge to the jury attempt to lay down any principles which should be applied in determining whether petitioner, if convicted, should be punished by life imprisonment rather than by death." (257 F. Supp. 716; App. A, p. 11a *infra*.)[38]

Little more than this description is necessary to raise grave doubt as to the constitutionality of such a procedure. Whatever else "due process of law" may encompass, it has always been thought to impose some demand of fundamental procedural regularity in decision-making, some insistence upon the rule of law, some adherence to the principle established by Magna Carta that the life and liberty of the subject should not be taken but by the law of the land. This Court has long condemned a degree of vagueness in criminal statutes that "licenses the jury to create its own standard in each case," *Herndon* v. *Lowry*, 301 U.S. 242, 263 (1937). See *e.g.*, *Smith* v. *Cahoon*, 283 U.S. 553 (1931); *Cline* v. *Frink Dairy Co.*, 247 U.S. 445 (1927); *Connally* v. *General Construction Co.*, 269 U.S. 385 (1926); *Winters* v. *New York*, 333 U.S. 507 (1948). The vice of such statutes is not alone their failure to give fair warning of prohibited conduct, but the breadth of room they leave for jury arbitrariness and suasion by impermissible considerations. *N.A.A.C.P.* v. *Button*, 371 U.S. 415, 432-433 (1963); *Freedman* v. *Maryland*, 380 U.S. 51, 56 (1965); Lewis, *The Sit-In*

[38] The Court of Appeals noted that "the defense in Maxwell's rape trial requested no instructional standards." But the court made nothing of this, and clearly did not suggest that it amounted to the sort of intentional bypassing required to forfeit claims under *Fay* v. *Noia*, 372 U.S. 391 (1963), and *Henry* v. *Mississippi*, 379 U.S. 443 (1965). See App. A, p. 46a *infra*.

Cases: Great Expectations, 1963 SUPREME COURT REVIEW 401, 410; Note, 109 U. Pa. L. Rev. 67, 90 (1960), including racial considerations, see *Louisiana v. United States*, 380 U.S. 145 (1965); *Dombrowski v. Pfister*, 380 U.S. 479 (1965); *Cox v. Louisiana*, 379 U.S. 536 (1965), and every other insidious urging of caprice or prejudice.

Under these decisions, it could scarcely be contended that an Arkansas statute would be valid which provided: "whosever is found condemnable in the discretion of a jury shall be guilty of an offense." Yet we submit that this suppositious statute stands no differently in light of the concerns of the Due Process Clause than the unregulated sentencing practice under which petitioner was condemned to die. The statute, it is true, deals with crime, and Arkansas' sentencing practice with punishment. But a practice that jeopardizes the integrity and reliability of the sentencing process is as unconstitutional as one that similarly affects the guilt-determining process. *Witherspoon v. Illinois*, 391 U.S. 510 (1968); *Mempa v. Rhay*, 389 U.S. 128 (1967). In *Witherspoon*, 391 U.S. at 521 n. 20, this Court noted that while sentencing choices—and, in particular, the choice of life or death may be

> "different in kind from a finding that the defendant committed a specified criminal offense, . . . this does not mean that basic requirements of procedural fairness can be ignored simply because the determination involved in this case differs in some respects from the traditional assessment of whether the defendant engaged in a proscribed course of conduct."

Traditionally, of course, it may have been thought that "fair notice" questions were raised by regulations defining offenses but not by those prescribing punishment. Yet it is

apparent that the vice of the "whoever is found condemnable" statute has little to do with notice. The statute is bad not because a man does not know how to behave consistently with it, but because, *however he behaves, he may be arbitrarily and capriciously taken by the heels.* The precise vice inheres in unregulated jury discretion to sentence a convicted man to life or death. He too may be dealt with arbitrarily, his life extinguished for any reason or none. Surely he is, at the same time, under Arkansas' singly verdict practice, found guilty of a defined crime. That conviction, however, cannot constitutionally be given the effect of stripping him of every civil right, including the fundamental right to due process of law. E.g., *Specht* v. *Patterson*, 386 U.S. 605 (1967).

Giaccio v. *Pennsylvania*, 382 U.S. 399 (1966), supports, if it does not compel, the conclusion that unfettered jury discretion in capital sentencing is unconstitutional. What was at issue there, as here, was a state practice governing disposition. No "fair notice" problem was involved—except, of course, the problem, noted by the Court, that it was impossible for defense counsel at trial to know what issues he was trying, as it is in a capital case tried to a jury having limitless sentencing power.[3] That decision turned squarely on the proposition that the Fourteenth Amendment forbade Pennsylvania to leave its "jurors free to decide, without any legally fixed standards," 382 U.S. at 402-403, whether

[3] The Court noted specifically that the problem of fair notice was only one of the problems with vague, standardless laws:

> "It is established that a law fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits *or leaves judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case.*" (382 U.S. at 402-403; emphasis added.)

the degree of arbitrariness allowed a State is more liberal where grave and irremediable penalties are at stake, see *Skinner v. Oklahoma*, 316 U. S. [illegible] (1942); and none is graver or more irremediable than the sentence of death for a [illegible] offense.

Nor did the trial court on [illegible] hearing of what has been presented here, evidence showing that in fact the sentencing discretion given juries has been exercised on the ground of race explicitly forbidden by the Constitution. See pp. [illegible] supra. Petitioner contends that the arbitrary and standardless discretion afforded Arkansas juries constitutes *per se* a deprivation of his constitutional rights. But obviously, evidence that abuse has in fact occurred has considerable bearing on the issue whether a practice challenged on the grounds of lawlessness [illegible] to be capable of such challenge. See, *e. g.*, *Yick Wo v. Hopkins*, 118 U. S. [illegible] (1886); *Norris v. Maryland*, 346 U. S. 366 (1953); *Hague v. CIO*, 307 U. S. 496 (1939); *Louisiana ex rel. Seals v. State*, [illegible] (1960).

Here petitioner does not contend that the [illegible] statute forbids the exercise of discretion in sentencing [illegible] to a jury, and even as a capital case. Was [illegible] to forego the absolute and simple discretion narrowly to acquit, and subject it to [illegible] and there may [illegible] a grant of discretion within constitutionally tolerable limits. Whether the approach taken by a State such as Nevada which makes [illegible] reasonable findings of fact the indispensable condition of imposing capital punishment (see Nev. Rev. Stat. [illegible] (1961)), or the approach of a [illegible] form which has administered for judicial decision at least some of the impermissible considerations against which [illegible] cases such as *Thompson v. [illegible]*, [illegible] U. S. [illegible] (1960), or that of the Model Penal Code which [illegible] establishes prerequisite findings and enumerates

aggravating and mitigating circumstances (see American Law Institute, Model Penal Code, § 210.6 (Proposed May 4, 1962), pp. 128-129; or that of the numerous States which provide plenary review of capital jury sentencing by trial and appellate courts, would be constitutional, is not the question presented. Conceivably the goals of sentencing are complex and in designing devices for achieving them the States must have some tolerance.

But as the issue of petitioner's sentence was submitted to the jury in its sole discretion under Arkansas procedure, the attention of the jurors was directed to none of the purposes of criminal punishment, nor to any pertinent aspect or aspects of the defendant's conduct. They were not invited to consider the extent of physical harm to the prosecutrix, the moral heinousness of the defendant's acts, his susceptibility or lack of susceptibility to reformation, the extent of the deterrent effect of killing the defendant "*pour décourager les autres*." H. Packer, *Making the Punishment Fit the Crime*, 77 Harv. L. Rev. 1071 (1964). They were permitted to choose between life and death upon conviction for any reason, rational or irrational, or for no reason at all: as a whim, a vague caprice, or because of the color of petitioner's skin.[1] In making the determination to impose the death sentence, they acted wilfully and unreasonably, without standards and without direction. Nothing assured that there would be the slightest thread of con-

[1] The court of appeals opinion states that the jury's "choice between capital punishment and life imprisonment . . . is not startlingly or shockingly different from the situation where choice of punishment within statutorily prescribed limits is left the judge." App. A p. 11a *infra*. But apart from the obvious point that the choice between life and death is not just any sentencing choice—judges unlike laymen can be assumed to be aware of the general purposes of criminal punishment, of relevant aggravating and mitigating factors, and of factors which cannot properly be taken into consideration.

process followed the sentence they enacted and are due reasonable justification for exacting it. Cf. Skinner v. Okla. Supra. To concede the complexity and interrelation of sentencing goals, see Packer, supra, is no reason to use them as procedural wheels to turn them all. It is futile to put forward justification for a death so inflicted; there is no assurance that the infliction responds to the justification we can ascribe to it in operation. Inevitably, under such a sentencing regime, capital punishment is those few, arbitrarily selected cases where it is applied, is both unpredictable and lawless, and is shown by the record here, conventionally imposed only on the members of minority groups.

C. The Courts Below Erred in Rejecting Petitioner's Constitutional Attack Upon the Arkansas Single Verdict Procedure for the Trial of Capital Cases.

Arkansas' practice of subjecting simultaneously to the trial jury the two issues of guilt and punishment in a capital case compounds the vice of lawless jury discretion just discussed by making it virtually impossible for the jurors to exercise their discretion in any rational fashion. Under Arkansas procedure, the jury hears evidence simultaneously on the issues of guilt and punishment, and usually both issues at a single sitting. Under this procedure, there is no separate hearing on penalty apart from the criminal trial itself, and no opportunity for allocution or for the presentation of evidence in mitigation of sentence after the finding of guilt but prior to the life/death sentencing choice.

The court of appeals pointed out that no request was made of the district court for a two-stage trial. App. A, p. 40a infra. But again the court of appeals did not suggest that this fundamental to the sort of intentional bypassing required to forfeit constitutional claims as against federal habeas corpus. See note 18 supra.

a requirement of rigid adherence to restrictive rules of evidence properly applicable to the trial." *Williams v. New York*, 337 U.S. 241, 247 (1949); see also *Williams v. Oklahoma*, 358 U.S. 576, 585 (1959); *Witherspoon v. Illinois*, 391 U.S. 510, 521 n. 20 (1968). A *fortiori*, a jury engaged on the task of determining whether a defendant shall live or die needs much information that cannot and should not be put before it within the confines of traditional and proper limitations on the proof allowable as going to guilt or innocence. It is fair to say that the overwhelming weight of considered contemporary judgment concurs in the conclusion that, whether discretionary death sentencing be done by a judge or jury, it is the imperative condition of rational sentencing choice that the sentencer consider more information about the individual defendant than is likely or permissibly forthcoming on trial of the guilt issue. E.g., House of Commons Select Committee on Capital Punishment, Report, (H.M.S.O. 1930), para. 177; Royal Commission on Capital Punishment, 1949-1953, Report (H.M.S.O. 1953) (Cmd. No. 8932), ¶¶ 12-13, 196, 201, 207; American Law Institute, Model Penal Code, Tent. Draft No. 9 (May 8, 1959), Comment to § 201.6 at 71-76; New York State Temporary Commission on Revision of the Penal Law and Criminal Code, Interim Report (Leg. Doc. 1965, No. 8) (February 1, 1965), 15-16; H.L.A. Hart, *Murder and the Principles of Punishment: England and the United States*, 52 Nw. U.L.Rev. 433, 438-439 (1957); Knowlton, *Problems of Jury Discretion in Capital Cases*, 101 U.Pa.L.Rev. 1099, 1109, 1133-1139 (1953); Mueller, *Background Readings in Murder Cases*, 31 J. Crim. L., Crim. & Pol. Sci. 317, 321-327 (1940).

The single verdict procedure therefore confronted petitioner, on trial for his life, with a gruesome Hobson's choice.

Petitioner had a crucial interest—amounting, indeed, to an independent federal constitutional right; see *Skinner v. Oklahoma*, 316 U.S. 535 (1942)—that his sentence be rationally determined. The Constitution guaranteed him, also, certain procedural rights in this sentencing process: *inter alia*, "an opportunity to be heard . . . and to offer evidence of his own." *Specht v. Patterson*, 386 U.S. 605, 610 (1967); *Mempa v. Rhay*, 389 U.S. 128 (1967). As the basis for a rational sentencing determination, he would want to present to the sentencing jurors evidence of his history, his character, his motivation, and the events leading up to his commission of the crime of which he was guilty (if he was guilty). The common law gave him a right of allocution which is an effective vehicle for this purpose, as well as for a personal appeal to the jurors, where capital sentencing is discretionary. And this Court has already recognized that allocution may in some circumstances rise to the dignity of a due process command.[43]

[43] *Hill v. United States*, 368 U.S. 424, 428-429 (1962); see *Andreas v. United States*, 373 U.S. 334, 336-337 (1963). Acting on these opinions, several circuit courts have found allocution a constitutional right. *Green v. United States*, 313 F.2d 6 (1st Cir. 1963), *cert. denied* 372 U.S. 951 (1963); *United States v. Johnson*, 315 F.2d 714 (2d Cir. 1963), *cert. denied*, 375 U.S. 971 (1964); *Behrens v. United States*, 312 F.2d 223 (7th Cir. 1962), *aff'd*, 375 U.S. 162 (1963).

The *Hill* case holds that, absent "aggravating" circumstances (368 U.S. at 429), failure of a sentencing judge to invite the defendant to exercise his right of allocution does not violate due process. But *Hill* was not a capital case, nor a case in which counsel was denied the right to present pertinent information to the sentencer, nor "a case where the defendant was affirmatively denied an opportunity to speak during the hearing at which his sentence was imposed . . . [nor where the sentencer] was either misinformed or uninformed as to any relevant circumstances . . . [nor where it was even claimed] that the defendant would have had anything at all to say if he had been formally invited to speak." *Ibid.* In an Arkansas capital case, the following "aggravating circumstances" are prescribed: (A) the circumstances that the right of allocution has had unique historical significance in capital

But to exercise his right of allocution before verdict on the guilt issue, petitioner was required to forego his constitutional privilege against self-incrimination. *Malloy* v. *Hogan*, 378 U.S. 1 (1964); *Griffin* v. *California*, 380 U.S. 609 (1965). He was required to take the stand and be subjected to cross-examination that could incriminate him." *United States* v. *Jackson*, 390 U.S. 570 (1968), holds that the exercise of the Fifth Amendment privilege in criminal trials may not be penalized or needlessly burdened. Simultaneous submission to the jury of the guilt and death

cases, see *Couch* v. *United States*, 335 F.2d 519, 521 (D.C. Cir. 1956) (opinion of Judge Fahy); *Coleman* v. *United States*, 334 F.2d 558, 566 (D.C. Cir. 1964) (opinion of Judges Burger and McGowan); (B) the circumstance that in capital cases matters which may affect the sensitive discretion of the jury in its life-death choice are traditionally viewed with a stricter eye to possibilities of prejudice than are other matters in the criminal process; see *People* v. *Hines*, 390 P.2d 398, 37 Cal. Rptr. 622 (1964); (C) the circumstance that Arkansas' single verdict procedure "affirmatively" denies a defendant his opportunity to address the jury on sentence, within the meaning of *Hill*, *supra*; (D) the circumstance that, for the reasons set out above in text, a jury making a capital sentencing choice on no other information than the trial of the guilt issue allows is invariably "either misinformed or uninformed" within the meaning of *Hill*; (E) the circumstance that, under the Arkansas procedure, not only is the defendant denied the right to make a personal statement without giving up his constitutional privilege against self-incrimination, but he is similarly denied the right to have his counsel supply evidence on the sentencing issue without incurring the risks of prejudice on the guilt issue, see the *Johnson* and *Behrens* cases cited, *supra*; also *Gadsden* v. *United States*, 223 F.2d 627 (D.C. Cir. 1955); *Jenkins* v. *United States*, 249 F.2d 105 (D.C. Cir. 1957).

" Even apart from cross-examination, allocution before verdict of guilt destroys the privilege, for much of the value of the defendant's personal statement to his sentencer derives from its spontaneity; see *Green* v. *United States*, 365 U.S. 301, 304 (1961) (opinion of Mr. Justice Frankfurter). This same spontaneity—unguided by the questions of counsel—leaves the defendant impermissibly unprotected as he appears before a jury which has not yet decided on his guilt. *Cf. Ferguson* v. *Georgia*, 365 U.S. 570 (1961).

penalty issues, results in just such a needless burden—needless because the State has ample means to avoid it by, for example, a bifurcated jury trial, judge sentencing, or the elimination of the death penalty. Further, *Simmons* v. *United States*, 390 U.S. 377, 394 (1968), where the question was whether a defendant might be obliged either to give up what he believed to be a valid Fourth Amendment claim or "in legal effect, to waive his Fifth Amendment privilege against self-incrimination," points the way to condemnation of the "undeniable tension" between constitutional rights presented here. That case held it "intolerable that one constitutional right should have to be surrendered in order to assert another." *Ibid.*

But the single-verdict practice which petitioner challenges presents grave problems in addition to this conflict between the right of allocution and the privilege. If the defendant seeks to present to the jury evidence of his background and character, apart from his own statement, the prosecution may counter with evidence of the defendant's bad character, including evidence of unrelated crimes. The prohibition which ordinarily keeps this sort of evidence from the trial jury sitting to determine the issue of guilt is "one of the most fundamental notions known to our law," *United States* v. *Reno*, 324 F.2d 582, 587 (2d Cir. 1963), arising "out of the fundamental demand for justice and fairness which lies at the basis of our jurisprudence," *Lovely* v. *United States*, 169 F.2d 386, 389 (4th Cir. 1948); see *Marshall* v. *United States*, 360 U.S. 310 (1959). Allowing the trial jury access to unfavorable background information, however pertinent to the issue of punishment, and however clearly limited by jury instructions to that use, may itself amount to a denial of due process of law. Compare *United States ex rel. Scoleri* v. *Hammiller*, 310 F.2d

720 (3d Cir. 1962), *cert. denied*, 374 U.S. 828 (1963), with *United States ex rel. Rucker v. Myers*, 311 F.2d 311 (3d Cir. 1962), *cert. denied*, 374 U.S. 844 (1963). In any event, the possibility that the background information will be strongly prejudicial forces a defendant to a "choice between a method which threatens the fairness of the trial of guilt or innocence and one which detracts from the rationality of the determination of the sentence." AMERICAN LAW INSTITUTE, MODEL PENAL CODE, *supra* at 64.

In this aspect the practice of simultaneous submission of guilt and sentence to a jury is much akin to New York's former practice of simultaneously submitting to a jury the two issues of the voluntary nature of a confession and the guilt of the accused. The New York practice was, of course, struck down in *Jackson v. Denno*, 378 U.S. 368 (1964), where the Court recognized that joint jury trial of the two issues prevented either from being "fairly and reliably determined." 378 U.S. at 389; see *id.* at 386-391. One fault of the practice was that:

> "... an accused may well be deterred from testifying on the voluntariness issue when the jury is present because of his vulnerability to impeachment by proof of prior convictions and broad cross-examination. ... Where this occurs the determination of voluntariness is made upon less than all of the relevant evidence." (378 U.S. at 389 n. 16).

And see *Bruton v. United States*, 391 U.S. 123 (1968).

[*] To the extent that petitioner's argument on this branch of his case draws sustenance from the radiations of the rule of *Jackson v. Denno*, text, *supra*, his argument is not weakened by *Spencer v. Texas*, 385 U.S. 554 (1967), cited by the court of appeals. The *Spencer* decision dealt with the Texas procedure for determining the punishment decreed under its recidivist statutes, pursuant to which a jury trying a criminal defendant was informed by a

It is in precisely the same manner that single verdict capital sentencing tends either to make trials of guilt

reading of the indictment that the defendant had been convicted of prior crimes, and evidence was introduced in support of these allegations during the course of trial. The procedure was attacked on the ground that it unduly prejudiced the defendant on the issue of guilt, in violation of the Due Process Clause. In rejecting this attack, the Court held, *inter alia*, that *Jackson* v. *Denno* did not require a two-stage jury trial for invocation of a state's habitual offender statute and that "the emphasis [in *Jackson*] was on protection of a specific constitutional right and the *Jackson* procedure was designed as a specific remedy to insure that an involuntary confession was not in fact relied upon by the jury." 385 U.S., at 565.

But no more "specific constitutional right" can be imagined than that which prohibits the state's taking of petitioner's life pursuant to a sentencing process which is irrational because sentencing choice is made without information essential to the choice. *Skinner* v. *Oklahoma*, *supra*; *Specht* v. *Patterson*, *supra*. And though the Court in *Spencer* read *Jackson* as not broadly requiring a two-stage jury proceeding whenever evidence of prior crimes which might possibly prejudice the jury's determination of the guilt issue is presented at the trial (because of the justifications generally accepted for permitting such evidence—see 385 U.S., at 560-61), Jackson's holding that "a general jury verdict [is] not a reliable vehicle for determining the issue of voluntariness [of a confession] because jurors might have difficulty in separating the issue of voluntariness from that of guilt or innocence," 385 U.S. at 565, is unimpaired. See *Burgett* v. *Texas*, 389 U.S. 109 (1967); *Simmons* v. *United States*, text, *supra*. That, by analogy, applies with equal, if not greater force to the jury's determination of the issues of guilt and sentence in a capital case. The "specific remedy" for reliably determining these issues enjoined on the courts by *Jackson*, reinforced by *Sims* v. *Georgia*, 385 U.S. 538 (1967), and endorsed by *Spencer* is that of separate consideration of the issues.

Moreover, there are crucial differences between the situation presented here and that presented by the practice challenged in *Spencer*. First, the sole claim urged by the petitioners in *Spencer* was that the introduction of prior crime evidence before jury verdict on the guilt issue unduly prejudiced the defendant on that issue (385 U.S. at 559, 567) and was therefore unconstitutional *per se*. Petitioner's submission here differs. The effect of the single verdict sentencing procedure which he challenges is to confront a capital defendant with the grim specter of having to sacrifice one or another of his precious constitutional rights, either allocution

unfair—by forcing the defense to present evidence potentially helpful on the punishment issue and prejudicial on the issue of guilt—or to produce the unfair result that men are sentenced to death "upon less than all of the relevant evidence" if the defense declines to take that risk.[9] Not only, in such a case, is the jury empowered to act arbitrarily, see pp. 58-65, *supra*; it is virtually compelled to do so for want of information upon which nonarbitrary choice can be based. In short, although the Due Process Clause guarantees a defendant a fair trial both on the issue of guilt, *e.g., Irvin* v. *Dowd*, 366 U.S. 717 (1961), and on the issue of punishment, *e.g., Townsend* v. *Burke*, 334 U.S. 736 (1948), the single-verdict procedure employed in petitioner's case deprives him of the one or the other. Cf. *Fay* v. *Noia*, 372 U.S. 391, 440 (1963).

As the question in *United States* v. *Jackson*, 390 U.S. 570 (1968), was whether the provision of the federal kidnaping statute reserving the infliction of the death sentence to the exclusive province of the jury "needlessly encourages" guilty pleas and jury waivers and therefore

or self-incrimination. By whatever choice he makes, he is prejudiced on either the issue of guilt or sentence; and he must decide—with his life at stake—which kind of prejudice to invite. Cf. *Whitus* v. *Balkcom*, note 16, *infra*. Also, while in *Spencer* the juries were given limiting instructions to guide their consideration of the prior crime evidence on the guilt issue, the jury's discretion in sentencing choice under Arkansas law is not limited or regulated in any way. See pp. 58-65, *supra*. Hence there is more than "the possibility of some collateral prejudice" (385 U.S. at 564) which the Court in *Spencer* thought not of sufficient gravity to condemn the procedure there attacked.

Finally, the Arkansas procedure has been shown on this record to have resulted in a pattern of racially discriminatory death sentencing. This goes far toward satisfying the concern of the *Spencer* court over the lack of a convincing showing of prejudice.

[9] Such a "grisly," hard, Hobson's choice is itself so unfair as to violate due process. See *Whitus* v. *Balkcom*, 333 F.2d 496, 499 (5th Cir. 1964).

"needlessly chill[s] the exercise of basic constitutional rights," 390 U.S., at 582, 583, so the question here is whether the simultaneous trial of guilt and punishment *needlessly encourages* the waiver of the right to remain silent or *needlessly chills* the right to put in evidence relevant to rational sentencing and the right of allocution. "The question is not whether the chilling effect is 'incidental' rather than intentional; the question is whether that effect is unnecessary and therefore excessive." 390 U.S., at 582. That question, put in focus by the ready availability of alternative modes of procedure not involving this dilemma—such as the split-verdict procedure now in use in a number of jurisdictions[47] and uniformly recommended by modern commentators, see *Frady* v. *United States*, 348 F.2d 84, 91 n. 1 (D.C. Cir. 1965) (McGowan, J.); cf. *United States* v. *Curry*, 358 F.2d 904, 914 (2d Cir. 1965)—presents at the least a significant issue of the fairness required by due process in trials where life is at stake, which this Court should grant certiorari to determine.[48]

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[47] A man tried on a capital charge in California, Connecticut, New York, Pennsylvania and Texas receives first a hearing on innocence or guilt; then, after a finding of guilt, a separate hearing on the issue of punishment. In view of the availability of this alternative "split-verdict" mode of procedure which does not entail the deprivation of petitioner's rights, the constitutionally unfair single-verdict procedure used in petitioner's case can obviously not be defended on the ground of necessity. Petitioner, of course, does not contend that the State is constitutionally compelled to have a bifurcated trial. The bifurcated trial is only one of the alternatives available to the State which do not entail the needless burden on capital defendants' constitutional rights here complained of.

[48] Cf. *Witherspoon* v. *Illinois*, 391 U.S. 510, 520 n. 18 (1968), noting that if a defendant could establish that a jury which was representative with respect to penalty was *not* representative with respect to guilt,

> "the question would then arise whether the State's interest in submitting the penalty issue to a jury capable of imposing

II.

The Courts Below Erred in Rejecting Petitioner's Attack Upon the Arkansas Scheme of Juror Selection, Which Provides the Opportunity for Racial Discrimination Proscribed by *Whitus* v. *Georgia*.

At the time of petitioner's trial, Arkansas law required the selection of jurors from electors, defined as those who had paid their county poll tax; and the names of such persons were required to be kept in a bound poll tax book where they were designated by race. Moreover, the jury list itself indicated race, 348 F.2d 332. These circumstances, we submit, bring this case within the ambit of *Whitus* v. *Georgia*, 358 U.S. 545 (1967); and the Eighth Circuit's rejection of the controlling force of *Whitus* merits review here.

Whitus held that a Georgia system of jury selection was unconstitutional because it provided the opportunity for racial discrimination in the juror-selection process. As the Court noted, the claim made in *Whitus* was "that Georgia's system of jury selection resulted in the systematic exclusion of Negroes from both the grand and petit juries in that *its law required* jury commissioners to select the names of prospective jurors from the books of the county tax receiver which were maintained on a racially segregated basis." 385 U.S., at 546 (emphasis added). The Court stated that "the jury lists for each county *are required by law* to be made up from the tax digest." 385

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capital punishment may be vindicated at the expense of the defendant's interest in a completely fair determination of guilt or innocence—given the possibility of accommodating both interests by means of a bifurcated trial, using one jury to decide guilt and another to fix punishment."

U.S., at 549 (emphasis added), and found that the jury lists "had been made up by reference to . . . the 1964 tax digest which had been prepared from the white and yellow tax return sheets of that year." *Ibid.* (The white tax return sheets designated white taxpayers and the yellow, Negro taxpayers. 385 U.S., at 548.) In this state of the record the Court held that the revised jury list from which the jurors were selected to try the defendant in that case "was suspect because of the system by which it was required to be prepared." 385 U.S., at 551.

> "Under such a system the opportunity for discrimination was present and we cannot say on this record that it was not resorted to by the commissioners." 385 U.S., at 552.

The parallels between the Georgia juror-selection system thus condemned and the Arkansas system used in petitioner's case are apparent. Under Arkansas law jurors were required to be selected from electors, whose names were required to be listed in racially designated poll tax books. This requirement without more provides the opportunity for racial discrimination. As the decision in *Whitus* indicates, it is the system which the law requires that makes any action taken under it unconstitutional. Hence, the reliance placed by the Court of Appeals on evidence that "the petit jurors were not selected from . . . [the racially designated elector] lists, although the lists were later checked, as they had to be, in order to determine that the jurors selected were qualified electors" (App. A, p. 52a *infra*), is misplaced. Moreover, even if, under *Whitus*, courts are to look beyond the legally established system for selecting electors, it is clear that the "later check" of the racially designated books, conceded by the court of appeals, provided "the opportunity for discrimination" which

the Constitution condemns.[49] The court of appeals' purported distinction of *Whitus* on the grounds that in Maxwell's case reference was made to the racially designated books only after an initial selection of jurors had been made, cannot stand. In *Whitus* too there was a source for the "revised" jury list independent of the prohibited tax digest—specifically, personal acquaintance of the commissioners with persons in their respective communities.[50]

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[49] The Court observed in *Whitus*:

> "The three jury commissioners who appeared as witnesses testified that they were not aware of the letter 'c' appearing after the names of the Negroes on the 1964 tax digest; that they never included or excluded anyone on the 'revised' jury list because of race or color; that they placed on the 'revised' jury list those persons whom they knew personally from their respective communities; that there were around 600 selected; and that the 'revised' list, which the commissioners themselves prepared, had no designation of race upon it." (385 U.S., at 549.)

Yet despite this testimony, the Court held that the juror-selection system was unconstitutional, because the revised list had been made up "by reference to" an old jury list, previously condemned on racial grounds, and a racially designated tax digest.

The jury commissioners in Maxwell's case also testified that they did not discriminate but did admit that they consulted the tax books to ascertain whether the names they had proposed for jury service appeared in the books. It is obvious that if the commissioners could consult the tax books for this purpose they could consult them also for the purpose of racial exclusion. As Mr. Justice Frankfurter stated in *Avery* v. *Georgia*, 345 U.S. 559 (1953), to which this Court referred in *Whitus* (385 U.S., at 551):

> "We may accept the testimony of the judge who drew the slips from the box as to the honesty of his purpose; that testimony does not refute the fact that there were opportunities to discriminate, as experience tells us there will inevitably be when such differentiating slips were used." (345 U.S., at 564.)

[50] In *Whitus* the Court stated that "The 'revised' jury list was made up from the 1964 tax digest, the old jury list *and the personal acquaintance of the commissioners with persons in their respective communities.*" (385 U.S., at 550; emphasis added.)

As the great bulk of decisions in the jury discrimination field attests, what is determinative of the question of discrimination is not the protestation of innocence by jury officials, nor indeed their good faith, but whether the *system* is one that assures a fair juror selection process. The state must not provide any unnecessary "opportunity to discriminate," cf. *Anderson* v. *Martin*, 375 U.S. 399 (1964), since if the occasion for racial discrimination is present it may be used. This is the teaching of *Whitus*, as evidenced in subsequent applications by this Court. *Bostwick* v. *South Carolina*, 386 U.S. 479 (1967); *Cobb* v. *Georgia*, 389 U.S. 12 (1967); *Sims* v. *Georgia*, 389 U.S. 404 (1967); *Anderson* v. *Georgia*, 390 U.S. 206 (1968); *Sullivan* v. *Georgia*, 390 U.S. 410 (1968).

The court below argued further that *Whitus* was distinguishable because of a serious disproportion between Negro population and representation as jurors, whereas "in Maxwell's case . . . we have no question whatsoever of inappropriate Negro representation on the Garland County jury list." (App. A, p. 53a *infra.*) But in *Williams* v. *Georgia*, 349 U.S. 375, 382 (1953), cited in *Whitus*, the Court said:

> "it was the system of selection and the resulting danger of abuse which was struck down in *Avery* and *not an actual showing of discrimination on the basis of comparative numbers of Negroes and whites on the jury lists.*" (Emphasis added)

And the Court in *Whitus* noted that "the circumstances here are akin to those condemned in *Avery* v. *Georgia* . . . ." (385 U.S., at 551.)

A system which requires racial designations in the sources of juror selection, thus offering the opportunity for discrimination, must, under *Whitus*, be condemned. At

the very least, the existence of such a system constitutes, under *Whitus*, a *prima facie* case of discrimination, shifting the burden to the State to show that in fact no discrimination took place. This Court should grant certiorari to consider the propriety of the holdings below that petitioners had not only to prove the existence of a scheme providing the opportunity for discrimination, but, in addition, the actual practice of discrimination.

CONCLUSION

Petitioners pray that the petition for a writ of certiorari be granted.

Respectfully submitted,

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APPENDIX A

Memorandum Opinion of the District Court

IN THE
UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF ARKANSAS

PINE BLUFF DIVISION

PB-66-C-52

WILLIAM L. MAXWELL,

Petitioner,

—v.—

O. E. BISHOP, Superintendent of the Arkansas State Penitentiary,

Respondent.

This is a habeas corpus proceeding wherein petitioner, William L. Maxwell, attacks collaterally for the second time his 1962 conviction in the Circuit Court of Garland County, Arkansas, of the crime of forcible rape. The sentence imposed upon him was death, Ark. Stats. Ann., §41-3403.

Petitioner, a Negro man, was charged with raping a 35 year old, unmarried white woman on the night of November 3, 1961. He pleaded not guilty and was tried before a jury. During the trial and during subsequent proceedings in the State court petitioner was represented by capable counsel of his own choice. Following the pronouncement of sentence and entry of judgment by the Circuit Court, petitioner appealed to the Supreme Court of Arkansas where his con-

viction was affirmed. Maxwell v. State, 236 Ark. 694, 370 S. W. 2d 113.

Subsequently, in early 1964 shortly before his scheduled execution petitioner filed in this Court a petition for habeas corpus challenging his conviction and sentence on a number of federal constitutional grounds. The case was assigned to District Judge Gordon E. Young who held a full evidentiary hearing and filed a detailed memorandum opinion denying the petition. Maxwell v. Stephens, E. D. Ark., 229 F. Supp. 205. The Court of Appeals, one judge dissenting, affirmed. Maxwell v. Stephens, 8 Cir., 348 F. 2d 325. In late 1965 the Supreme Court of the United States denied certiorari. Maxwell v. Stephens, 382 U. S. 944.

In due course the Governor of Arkansas scheduled the execution of petitioner for late July 1966; however, the execution was stayed administratively until September 2. That stay is still in effect.

Instant petition was filed on July 21, 1966. On August 5 a pre-trial conference was held, and the case was set for hearing on the merits on August 22. That hearing has been held as scheduled. The Court has given careful consideration to the materials before it, including oral testimony and documentary evidence. This opinion incorporates the Court's findings of fact and conclusions of law.

In the petition now before the Court petitioner alleges certain things that he alleged in his initial habeas corpus action; some things that were alleged in that action are not alleged here;[1] and the present petition contains some allegations that did not appear in the original proceeding.

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[1] Contentions made in the original proceeding and not urged here are: that petitioner was the victim of an unlawful arrest; that there was an unlawful search of petitioner's person and home; that evidentiary material was unlawfully seized in the course of the searches; that petitioner was mistreated physically and that a

Petitioner now contends that racial discrimination was practiced in the selection of the petit jury which tried and convicted him;* that it is unconstitutional to put anyone to death for the crime of rape;* that certain Arkansas statutes to be mentioned dealing with the crime of rape and the punishment to be imposed therefor have been applied unconstitutionally to Negro men convicted of raping white women;* that certain Arkansas statutes dealing with the imposition of the death penalty and certain Arkansas trial procedures in capital cases amount to a denial of due process of law; that petitioner was mentally incompetent to stand trial in the State court, and that his mental condition is now such that it would be unconstitutional to put him to death.[2]

In his pleadings respondent denies that any of petitioner's contentions have merit and, in addition, pleads res judicata, that is to say, respondent asserts that all contentions made here were either raised or could have been raised in the original proceeding in this Court and should not now be considered.

As far as respondent's plea of res judicata is concerned, it is settled that the conventional rule that issues which were litigated or which could have been litigated in an

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confession was extorted from him; that petitioner was tried in a hostile atmosphere. All of those contentions were considered and rejected by Judge Young; not all of them were urged on appeal; those that were were rejected by a majority of the Court of Appeals. This Court considers that all of the contentions not brought forward into this proceeding have been abandoned or that their lack of merit has been established in the original collateral attack on the State court judgment.

[2] The asterisks appearing in text indicate that the contention marked by the asterisk was raised in the original habeas corpus case.

original proceeding will not be again examined in a subsequent proceeding between the same parties or their privies does not apply with strictness to habeas corpus proceedings in the federal courts. Whether a federal court will entertain a successive application for a writ of habeas corpus, and whether and to what extent such a court will consider in connection with a successive petition matters which were or could have been determined in the original proceeding are questions addressed to the sound discretion of the court. See 28 U. S. C. A., §2244; Sanders v. United States, 373 U. S. 1; Simcox v. Harris, 8 Cir., 324 F. 2d 377. Of course, the fact that a specific contention brought forward in a successive application has been considered and rejected in connection with an earlier application is a factor to be considered by the court to which the successive application is addressed.

In this connection the Court in its pre-trial conference order in this case cautioned counsel for petitioner that if they knew of any constitutional grounds for attack on his conviction which had not been raised, such grounds should be brought forward in this proceeding since the Court "would be most reluctant to consider in some subsequent proceeding any grounds of attack which could have been raised in this proceeding." No contentions other than those previously mentioned have been made.

Taking up first the attack on the make-up of the jury, petitioner's complaint is that the Garland County jury commissioners chose the members of the jury panel from tax records identifying poll tax payers by race. That is the same complaint about the jury which was made in the original habeas corpus case, and the record here is the same as the one before the Court in that case. The matter was considered thoroughly by Judge Young and by the Court of

Appeals and, as indicated, the argument was rejected. This Court sees no occasion to reexamine the question and is not persuaded to do so by the action of the Supreme Court in recently granting certiorari in the case of Sims v. Georgia, 384 U. S. 998, noted in 34 U. S. Law Week 3429.

The Court finds it convenient to consider next the contentions with respect to the mental condition of petitioner.

As to the mental condition of petitioner at this time, it was agreed following the pre-trial conference that petitioner would be examined by the staff of the Arkansas State Hospital for Nervous Diseases. The examination was made and petitioner was found to be without psychosis. He thus, in effect, had the benefit of the post-conviction examination contemplated by Ark. Stats. Ann., §43-2622. In addition, at the request of counsel for petitioner he was examined by Dr. William G. Rees, Professor of Psychiatry and head of the Department of Psychiatry at the University of Arkansas Medical Center. Dr. Rees also found petitioner to be without psychosis. Petitioner was present at the hearing and was observed by the Court; the Court noted no irrationality in petitioner's behavior, and petitioner gave no evidence of present mental incompetency. While the contention has not been abandoned formally, it has not been pressed, and the Court finds it to be without merit.

With respect to petitioner's mental incompetency in 1962 to stand trial for the offense allegedly committed in November 1961, the thrust of the argument seems to be not so much that petitioner was in fact mentally incompetent to stand trial but rather that in the circumstances the Circuit Court was required to make a judicial determination of his competency, that no such determination was made, and that its absence voids the conviction. Pate v. Robinson, 383 U. S. 375; see also United States ex rel. Robinson v. Pate, 7 Cir., 345 F. 2d 691.

The facts in that case were that the defendant, Robinson, was tried to the court without a jury in Illinois on a charge of first degree murder; his defense was insanity, and his mental condition both at the time of the commission of the alleged offense and at the time of trial were directly in issue in the case. He had a long history of behavior indicating serious mental disease; that history was brought out by testimony in the course of the trial, and four witnesses testified that in their opinion defendant was insane. In the course of the trial the prosecuting attorney conceded that there was doubt as to the sanity of the defendant and suggested that a psychiatrist in the employ of Cook County be called as a witness. Notwithstanding the fact that a statute of Illinois provided that whenever the evidence raises a "bona fide doubt" as to a defendant's competency to stand trial, it is the duty of the judge on his own motion to impanel a jury to pass on the question,[3] the trial judge indicated that it was not necessary for the State to call the psychiatrist, did not impanel a jury to consider the question of Robinson's sanity, and found the defendant guilty without making any specific finding as to his competency to stand trial. Both the Court of Appeals and the Supreme Court held that this action amounted to a denial of due process of law.

The facts in this case are quite different from those in *Robinson*. As far as petitioner's mental competency is concerned, the transcript of the proceedings in the Circuit Court reflects the following:

On November 7, 1961, an information was filed by the Prosecuting Attorney charging petitioner with the crime of

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[3] Ill. Rev. Stat., c. 38, §104-2, referred to in the opinions of both the Supreme Court and of the Court of Appeals.

rape committed on November 3. On November 28, 1961, it having been made to appear to the Court that petitioner desired counsel and was without means to employ counsel, an order was entered appointing two members of the Hot Springs, Arkansas Bar to represent petitioner without charge. On November 30 those attorneys proceeding under the provisions of Ark. Stats. Ann., §§43-1301 et seq. filed a petition for an order committing petitioner to the State Hospital for observation and report;[4] on the same day the petition was granted and petitioner was committed for a period of not more than one month. Petitioner was delivered to the Hospital authorities on December 1, and the Hospital staff made its report on December 29.

The Hospital report, signed by Dr. E. W. Crow, the examining physician, and approved by Dr. George W. Jackson, the Hospital superintendent, contained a diagnosis of "without psychosis." The report recited that it was the opinion of the examining physician and of the joint psychiatric staff that petitioner "was not mentally ill, to the degree of legal irresponsibility at the time of this mental examination" and "was probably not mentally ill, to the degree of legal irresponsibility at the time of the alleged commission of his acts."[5]

On January 15, 1962, petitioner, still represented by his appointed attorneys, was arraigned and entered a plea of not guilty. No suggestion was made to the Circuit Judge that petitioner was not mentally competent to plead or to

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[4] The filing of such a petition is not an uncommon practice in Arkansas in cases involving sexual offenses even where there is no real question as to the sanity of the defendant; the request may be made as a precautionary measure or at least as a time gaining device.

[5] The language of the report tracks the language of the statute. See Trotter and Harris v. State, 237 Ark. 820, 822, 377 S.W. 2d 14, ...

stand trial. On February 5 the case was set for trial, but a telegram was received by the Prosecuting Attorney to the effect that Mr. Christopher C. Mercer, Jr., a Negro attorney of Little Rock, had been employed to represent petitioner; accordingly, the setting was cancelled, and the case was passed for the time being. On the same day Mr. Mercer moved for a continuance of the case. That motion was granted, and by agreement the case was set for trial on March 19. At this point in the proceedings petitioner's appointed counsel were permitted to withdraw from the case.

Prior to the trial the Circuit Court was not requested to hold any sanity hearing or to take any testimony as to the mental condition of the accused; insanity was not an issue at the trial. No question of petitioner's mental competency was raised in connection with his appeal to the Supreme Court of Arkansas nor in connection with the original habeas corpus proceeding which he filed in this Court.

Conceding that Pate v. Robinson, supra, emphasizes that it is a denial of due process of law to put a person to trial on a criminal charge when he lacks the mental competency to stand trial, this Court does not believe that that decision or any other decision makes it the constitutional duty of State trial judges to hold sanity hearings on their own motion simply because there has been a routine pre-trial psychiatric examination of the defendant resulting in a negative report.

Certainly, in connection with this successive application for habeas corpus this Court is not willing to hold that the absence of a sanity hearing in the State court deprived petitioner of any federally protected right. It must be remembered that at the trial of the case petitioner was represented by an attorney not only of his own choice but also

of his own race. Presumably, if petitioner had been unable to comprehend the nature of the proceedings, to understand the charges against him, or to communicate intelligently with his attorney relative to his defense, that inability would have manifested itself to counsel prior to or during the trial and counsel would have brought the matter to the trial court's attention.

After petitioner's conviction his attorney filed a long motion for a new trial attacking the conviction on 40 grounds; mental incompetency was not one of them.

In the course of the pre-trial conference in this case, which was attended by Mr. Mercer although he does not represent petitioner in this case, the question of petitioner's mental competency to stand trial was discussed to some extent and nothing was said which would indicate that there is any real basis for belief that petitioner was not mentally competent in 1962. Nor is there anything in the reports of the State Hospital Staff or of Dr. Rees, which would form the basis for such a belief. Petitioner may be of somewhat low mentality, but mere mental weakness is not the equivalent of mental incompetency to stand trial or to be held guilty of a crime.

Before discussing the remaining contentions of petitioner the Court considers it advisable in the interest of precision to make some general comments relative to sentencing procedures in the Arkansas courts.

In all non-capital criminal cases, whether felonies or misdemeanors, which are tried to juries, the jury affirmatively fixes within statutory limits the punishment to be imposed. If the jury agrees that the defendant is guilty but is unable to agree on the punishment, it may, if it desires to do so, return the verdict of guilty and request the judge to fix the punishment.

In capital cases the procedure is somewhat different. Under the substantive criminal code of Arkansas the punishment, and the only punishment, provided for a capital offense, such as first degree murder or rape, is death by electrocution. However, by virtue of Act 187 of 1915, which now appears as Ark. Stats. Ann., §43-2153, a trial jury in a capital case has the right to render a "verdict of life imprisonment in the State penitentiary at hard labor" in lieu of the death penalty. But, if the defendant is found guilty and punishment is not assessed at life imprisonment, the legal penalty is automatically death.

It is thus not correct, strictly speaking, to say that Arkansas juries "impose the death penalty" on anyone. Rather, those juries have the right in a sense to exercise clemency toward particular defendants by assessing the penalty of life imprisonment at hard labor in a capital case.

The Arkansas statutes attacked by petitioner in general and in their application to Negro men convicted of raping white women are Ark. Stats. §41-3403 and §43-2153, read together.

The basic argument that it is unconstitutional to inflict the death penalty upon any person for the crime of rape presents a question of law only which has been ruled upon adversely to petitioner by Judge Young and by the Court of Appeals. A possible variant of that basic argument to the effect that it is unconstitutional to permit a jury of twelve people, with responsibility divided among them, to determine ultimately whether a person convicted of a capital crime shall suffer death or be imprisoned for life is likewise rejected by this Court. If a State can constitutionally impose the death penalty for a crime, this Court sees no constitutional objection to permitting a jury rather than a trial judge to decide whether that penalty shall be imposed

in a particular case. And in this connection it might be pointed out that the obvious purpose of section 43-2153 is to permit juries to extend a degree of mercy to defendants convicted of capital crimes, not to make the assessment of the death penalty easier or more likely.

The argument is made, however, that in any event it is a denial of due process to permit a jury to make its determination solely by the exercise of its collective discretion without standards or guide lines laid down in the statutes, or judicial decisions, or in the instructions of the court.

It may be conceded that the Arkansas statutes dealing with rape and dealing with capital punishment do not purport to set up any standards by which the jury is to exercise its discretion in determining whether it should exercise the power conferred upon it by section 43-2153, and it will be assumed that no such standards are to be found in the reported decisions of the Supreme Court of Arkansas. Nor did the Circuit Court in its charge to the jury attempt to lay down any principles which should be applied in determining whether petitioner, if convicted, should be punished by life imprisonment rather than by death.[6]

The Court does not think, however, that it is constitutionally necessary for specific standards or guide lines to be laid down or brought to the attention of the jury. Whether a convicted rapist or murderer is to suffer death, on the one hand, or life imprisonment, on the other, rests under Arkansas procedure, within the discretion of the jury, to be exercised in the light of the judgment, common sense, and experience of the jurors. Jurors are presumed

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[6] It does not appear that counsel for petitioner requested any instructions on the subject.

to be persons of good judgment and common sense. If they do not know without being told that in determining whether clemency should be extended in a given case they should take into consideration all of the relevant facts and circumstances shown in evidence and should weigh aggravating circumstances, if any, against mitigating circumstances, if any, no useful purpose will be served by telling them.

On this phase of the case petitioner again relies on a very recent Supreme Court decision. Giaccio v. Pennsylvania, 382 U. S. 399. Again, his reliance is misplaced.

Giaccio involved a peculiar 1860 statute of Pennsylvania which permitted a jury in a misdemeanor case to determine by its verdict whether a defendant acquitted on a misdemeanor charge might nonetheless be taxed with the costs of the prosecution. Giaccio was tried on a misdemeanor charge; the jury found him not guilty but taxed him with the costs. The statute itself prescribed no standards by reference to which the jury was to determine whether an acquitted defendant should be charged with costs. However, Pennsylvania decisions had established that costs were not to be charged against an acquitted defendant unless his conduct had been " 'reprehensible in some respect,' 'improper,' outrageous to 'morality and justice,' or that his conduct was 'not reprehensible enough for a criminal conviction but sufficiently reprehensible to deserve an equal distribution of costs' or that though acquitted 'his innocence may have been doubtful.' " 382 U. S. at page 404. The jury was instructed "that it might place the costs of prosecution on the appellant though found not guilty of the crime charged, if the jury found that 'he has been guilty of some misconduct less than the offense which is charged but nevertheless misconduct of some kind as a result of which he should be required to pay some penalty short of

conviction (and) . . . his misconduct has given rise to the prosecution.'" Ibid.

The trial court ultimately held the statute unconstitutional, but the State appellate courts disagreed. There was an appeal to the Supreme Court of the United States, and that Court held the statute unconstitutionally vague notwithstanding the construction which had been placed upon it by the courts of Pennsylvania. In concurring opinions Justices Stewart and Fortas thought it sufficient to say simply that it is unconstitutional to tax the costs of the prosecution against an acquitted defendant.

Evidently, the majority of the Court were not unmindful that it might be contended that the holding would be used to attack the practice prevailing in many States, including Arkansas, of permitting juries finding defendants guilty to fix the punishments within legal limits. And the Court expressly noted that it intended "to cast no doubt whatever on the constitutionality of (that) practice." 382 U. S. at page 405, f.n. 8.

It is true that in his concurring opinion Mr. Justice Stewart said (p. 405 of 382 U. S.):

> ". . . It seems to me that, despite the Court's disclaimer, much of the reasoning in its opinion serves to cast grave constitutional doubt upon the settled practice of many States to leave to the unguided discretion of a jury the nature and degree of punishment to be imposed upon a person convicted of a criminal offense. Though I have serious questions about the wisdom of that practice, its constitutionality is quite a different matter. . . ."

Whether the interpretation which Justice Stewart place upon the reasoning of the majority turns out to be accurate

remains to be seen; for the present at least this Court will accept the majority's disclaimer at face value. And, the Court thinks that the Arkansas practice, which has been described, falls within the terms of the disclaimer.

The contention which has been urged most seriously here, and which has been ably argued by Professor Amsterdam of the University of Pennsylvania Law School, who is of counsel in the case, is that Arkansas juries customarily apply Ark. Stats. Ann., §§41-3403 and 43-2153 in a racially discriminatory and unconstitutional manner to Negro men who have been convicted of raping white women so that a disproportionate number of such defendants receive the death penalty. And it is argued that it makes no difference that the sentence results from negative jury action in failing to assess punishment at life imprisonment rather than from affirmative jury action in voting the sentence of death.

The same contention was made in the State courts and, as indicated, was urged before Judge Young and before the Court of Appeals. In those proceedings petitioner sought to establish his thesis by the use of execution records of the State of Arkansas and by records of sentences imposed in rape cases over a period of time in Garland, Pulaski, and Jefferson Counties. The statistics which petitioner was able to produce in the earlier proceedings were not convincing to the Courts concerned.

In the instant case petitioner relies upon the results of a study made in 1965 by Professor Marvin Wolfgang, a well qualified sociologist and criminologist on the faculty of the University of Pennsylvania. Dr. Wolfgang, whose qualifications to testify as an expert are not questioned and are established, testified at the hearing, and a written report prepared by him, together with certain other rele-

vant documentary material, was received in evidence without objection.

The background facts of the Wolfgang study may be summarized as follows:

In early 1965 Dr. Wolfgang was engaged by the NAACP Legal Defense and Educational Fund, Inc. to make a study of rape convictions in a number of southern States, including Arkansas to prove or disprove the thesis that in those States the death penalty for rape is disproportionately imposed upon Negro men convicted of raping white women.

Dr. Wolfgang was apprised of the fact that the results of his study might well be used in litigation such as the instant case.

As far as Arkansas is concerned, Dr. Wolfgang caused Mr. John Monroe, a qualified statistician, to select a representative sample of Arkansas counties with reference to which the study would be made. The sample drawn by Mr. Monroe, who testified at the hearing, consisted of 19 counties in the State.

During the summer of 1965 law students interested in civil rights problems were sent into Arkansas to gather basic data with respect to all rape convictions in the sample counties for a period beginning January 1, 1945, and extending to the time of the investigation. Data obtained as to individual cases were recorded on individual case schedules. When the work was completed, the individual schedules were turned over to Dr. Wolfgang for evaluation.

The investigation brought to light 55 rape convictions during the study period involving 34 Negro men and 21 white men. The offenses fell into three categories, namely: rapes of white women by Negro men; rapes of Negro women by Negro men; and rapes of white women by white men.

No convictions of white men for raping Negro women were found.

Dr. Wolfgang found that of the 34 Negroes convicted of rape 10 had been sentenced to death and 24 had been sentenced to life imprisonment; the corresponding figures for the white offenders were 4 and 17. The witness did not consider that particular variation to be of great significance. But he did attach great significance to the fact that of the 19 Negroes convicted of raping white women 9, or nearly 50 percent, had been sentenced to death, whereas in other racial situations only 5 death sentences had been imposed, those 5 sentences representing only about 14 percent of the total sentences imposed in those situations.[1]

Using recognized statistical procedures Dr. Wolfgang undertook to determine whether the differential in the imposition of the death sentence was due to some factor other than the association between Negro offender and white victim. He concluded, and the Court agrees, that the differential could not be due to the operation of the laws of chance.

The witness then proceeded to consider race in relation to certain variables appearing in rape cases,[2] and also to

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[1] The figures just given relate to convictions and sentences imposed. Actually those figures involve some duplications of individuals. The overall record reflects that two Negroes were convicted twice of raping white victims and received the death sentence each time. One Negro was convicted twice of raping two Negro women and received a life sentence in each case. And two white men were each convicted twice of raping two white women; in each instance the original sentence imposed was life imprisonment, and the second sentence was death.

[2] Generally speaking, and subject to certain exceptions, the variables appear to the Court to be facts or circumstances which reasonably might be supposed to either aggravate or mitigate a given rape. Variables included, but were not limited to, such

consider sentences imposed in relation to such variables. He found that race had significant associations with certain variables but not with others, but he also found that in general the sentences imposed had nothing significant to do with the variables, other than the combination of Negro offenders and white victims.

Without stopping to go into further detail, the Court will state that it understands Dr. Wolfgang's conclusion to be that a Negro man who is convicted of raping a white woman has about a 50 percent chance of receiving a death sentence, regardless of the facts and circumstances surrounding the crime, whereas a man who is convicted of criminally assaulting a woman of his own race stands only about a 14 percent chance of receiving the death sentence.

Petitioner has made no effort here to show that the individual jury which tried and convicted him acted in his particular case with racial discrimination. Rather, petitioner urges that a showing of a pattern of racial discrimination in the imposition of the death penalty makes a prima facie showing of such discrimination in a particular case; that a failure of an Arkansas jury to assess punishment at life imprisonment in a capital case is tantamount to an assessment of the death penalty; and that it is unconstitutional for a jury to permit a death sentence to be imposed on a Negro man convicted of raping a white woman if it would have assessed a penalty of life imprisonment had the defendant been white and had he raped the same woman in the same or similar circumstances.

In appraising petitioner's contention and in weighing the testimony and report of Dr. Wolfgang the Court lays to

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factors as age of defendant, age of victim, degree of force, degree of injury, weapon use or display, and marital and family status of offender and victim.

one side the fact that in Sims v. Georgia, supra, the Supreme Court has agreed to review, among other things, the question of whether a Georgia trial court committed error in refusing to hear testimony to the effect that during a certain period in Georgia 19 times more Negroes than whites have received the death sentence in rape cases. In this case the Court has heard and considered all of the evidence which petitioner has offered.

While the statistical evidence produced in this case is more extensive and sophisticated than has been produced heretofore the Court is not convinced that it is sufficiently broad, accurate, or precise as to establish satisfactorily that Arkansas juries in general practice unconstitutional racial discrimination in rape cases involving Negro men and white women or to require or justify the inference that the Garland County jury which tried petitioner was motivated by racial discrimination when it failed to assess a punishment of life imprisonment.*

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*Garland County was not included in the sample group of counties considered by Dr. Wolfgang. Garland County statistics were before Judge Young in the original habeas corpus proceedings and were summarized in the opinion of the Court of Appeals. Maxwell v. Stephens, supra, 348 F. 2d at 330. Those figures revealed that in the ten year period beginning January 1, 1954, seven white men and three Negroes were charged with rape in that county. Two of the victims of the white men were white; the races of the other victims of those men were not disclosed. The victims of the Negro offenders were two Negro and one white woman. Charges against four of the white men were not pressed; the other three were convicted of lesser crimes. The charges against one of the Negroes was dismissed, and a second was convicted of a lesser offense. The third, petitioner here, was convicted of raping a white woman and received the death sentence. There is no question that the facts and circumstances surrounding his offense were such as to justify the imposition of that sentence entirely apart from any consideration of race.

The study does not indicate that Negro men convicted of raping white women invariably or even in a majority of cases receive the death penalty. The study covered only 55 cases over a twenty year period in 19 Arkansas counties containing, according to the census of 1960 47 percent of the State's population, and after making allowances for duplications it appears that only 7 Negro men were sentenced to die for raping white women. The cases studied, and the number of death sentences imposed are simply too few in number to afford convincing proof of the proposition urged by petitioner.

As to the sample which was considered, Dr. Wolfgang said in his report that the included counties "are a stratified random sample of Arkansas counties, geographically dispersed throughout the State and representative of the State in urban-rural and white-Negro population ratios." Although the sample drawn by Mr. Monroe seems to have been drawn in a manner which is acceptable statistically, the quoted statement of Dr. Wolfgang is simply not correct, and this was recognized by Mr. Monroe and is made clear by an examination of a map of the State attached to the report.

The Negro population of Arkansas is not distributed evenly over the State, nor is the State's overall population distributed evenly from the urban-rural standpoint. An examination of the map which has been mentioned shows that the counties included in the sample are for the most part located in the southern and eastern portions of the State where the Negro population is heaviest and include most of the large urban centers in the State such as the Little Rock-North Little Rock metropolitan area, and the cities of Blytheville, El Dorado, Fort Smith, and Pine Bluff.

The variables which Dr. Wolfgang considered are objective; they are broad and in instances are imprecise. In connection with many of the cases studied the field workers were unable to obtain from available sources information which might have been quite pertinent, and Dr. Wolfgang's statistics really reveal very little about the details of the cases of the 7 individual Negroes who received the death sentence for raping white women as compared to the details of the cases in which other racial situations were involved.

Dr. Wolfgang himself recognizes in his report and in his testimony that his conclusions are subject to attack from certain angles due in large measure to the small number of cases studied and lack of available information in many of those cases. In his report he states frankly:

> "This report contains a preliminary analysis of data obtained in a study designed to determine the effect of racial factors upon capital sentencing for rape in the State of Arkansas. The preliminary analysis is neither exhaustive nor conclusive. Its findings, presented below, are tentative and are based upon an exploratory investigation of the available data. Interpreting the results must be done with caution. Subject to this qualification, the preliminary analysis strongly suggests that racial discrimination is operative in the imposition of the death penalty for rape in Arkansas."

On the meager material before it the Court is simply not prepared to convict Arkansas juries of unconstitutional racial discrimination in rape cases. As a matter of fact, the Court doubts that such discrimination, which is a highly subjective matter, can be detected accurately by a statis-

tical analysis such as was undertaken here. Statistics are elusive things at best, and it is a truism that almost anything can be proved by them.

The Court does not intend to belittle either the study made by Dr. Wolfgang or his testimony. But the Court is simply not convinced by them any more than the Supreme Court of Arkansas, Judge Young, and the Court of Appeals were convinced by the materials previously submitted.

In his opinion Judge Young aptly stated that the issue of consent is always involved in rape cases. In cases not involving inter-racial situations the issue of consent may be and frequently is very real; that issue from a factual standpoint is much less likely to be present in cases in which white women have been attacked by Negro men. And the disproportion between death sentences imposed on Negro men convicted in inter-racial cases and such sentences imposed in other cases may well be referable in large measure to the fact that in the former cases the trial jurors may have a firmer and more abiding conviction of the truth of the charges than in cases of the latter type.

The final contention to be discussed does not involve any Arkansas statute but does involve Arkansas criminal procedure generally. Under that procedure the State puts on its evidence first, and in many types of cases, including rape cases, evidence which is relevant to guilt is also relevant to punishment. When the State has completed its presentation, the defense may or may not introduce evidence, and the defendant may or may not testify in his own behalf. If he does testify, he waives his privilege against self-incrimination with respect to the charge against him, and may be cross examined as fully as any other witness. The deliberations of the jury relate to both the

question of guilt and the question of punishment; there is no post-conviction hearing before the jury as to the punishment which the defendant should receive.

Petitioner, who did not take the stand in the course of the trial in the Circuit Court, attacks as unconstitutional the procedure which has been outlined. He alleges that the procedure is unconstitutional because "evidence pertinent to the question of penalty could not be presented without prejudicing the jury against the petitioner on the issue of guilt," and because he could not exercise his constitutional "right of allocution" before the jury which sentenced him, without thereby waiving his privilege against self-incrimination.

In effect, petitioner contends that where a State leaves the matter of punishment to a jury's determination the Constitution requires that the issue of guilt or innocence must be tried out first, and that if the defendant is found guilty, a separate hearing must be held before the jury on the question of punishment in the course of which hearing the defendant can testify as to mitigating circumstances without prejudice to himself since his guilt has been determined already.

While some States follow that procedure, this Court does not believe that the Constitution requires it. The Court does not consider that Jackson v. Denno, 378 U. S. 368 and Malloy v. Hogan, 378 U. S. 1, are in point here.

An order denying the petition will be entered forthwith. This Court will not stay petitioner's execution beyond September 2 and will decline to grant a certificate of probable cause to appeal if such a certificate is requested. Petitioner has ample time to apply to the Court of Appeals for relief.

Dated this 26 day of August, 1966.

J. SMITH HENLEY
United States District Judge

Order of the District Court

IN THE
UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
PINE BLUFF DIVISION
PB-66-C-52

WILLIAM L. MAXWELL,
Petitioner,

—v.—

O. E. BISHOP, Superintendent of the Arkansas State Penitentiary,
Respondent.

Pursuant to memorandum opinion filed this date the petition for a writ of habeas corpus filed herein is denied.

Dated this 26 day of August, 1966.

J. SMITH HENLEY
United States District Judge

Opinion of the Court of Appeals

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 18,746

William L. Maxwell,

Appellant,

v.

O. E. Bishop, Superintendent, Arkansas State Penitentiary,

Appellee.

Appeal from the United States District Court for the Eastern District of Arkansas.

[July 11, 1968.]

Before VOGEL, MATTHES and BLACKMUN, Circuit Judges.

BLACKMUN, Circuit Judge.

William L. Maxwell, a Negro and an Arkansas prisoner under sentence of execution on his 1962 conviction for the state crime of rape, as defined by Ark. Stat. Ann. § 41-3401 (Repl. 1964),[1] petitions a second time for a federal writ

[1] Section 41-3401, as it existed at the time of the offense and Maxwell's conviction, was repealed by Acts 1967, No. 362, § 3, and was replaced by § 1 of the same Act. The new statute separates the crime of rape into third, second, and first degrees. Rape in the first degree is, among other things, sexual intercourse with a female by "forcible compulsion". Rape in the second and third degrees has age conditions. Section 41-3403 which, through § 43-2153, prescribed, upon conviction of rape, a punishment of death or, if the jury chose, life imprisonment, also was, by §§ 3 and 2 of the same 1967 Act, repealed and replaced. The replacement section defines rape as a felony and provides for sentences within prescribed ranges, as to years, for third and second degree rape and, for first degree rape, of "death or thirty (30) years to life imprisonment". If the offense for which Maxwell was convicted had been committed since the effective date of the 1967 Act, it would qualify as rape in the first degree.

of habeas corpus and, with its denial, a second time appeals. The points now urged to us are (1) that a prima facie case of racially discriminatory imposition of the death penalty for rape in Arkansas has now been established and remains unrebutted by the State; (2) that Arkansas' single verdict procedure is without appropriate standards, allows the jury to exercise its discretion irrationally, and is impermissible; and (3) that the decisions of the United States Supreme Court since Maxwell's first federal appeal demonstrate the error of our prior holding, adverse to the petitioner, on the jury selection issue.[2]

We again review the background:

1. The offense for which Maxwell was charged was committed in the early morning of November 3, 1961, in the City of Hot Springs, Garland County, Arkansas. Maxwell, who was 21 at the time, was arrested within two hours after the offense was committed. His convicting jury did not "render a verdict of life imprisonment in the State penitentiary at hard labor", as it had the option to do [since 1915 (Acts 1915, No. 187, § 1, p. 774)] under §§ 43-2153 and 41-3403 and for which it had been given an alternate verdict form. Accordingly, and in line with the interpretation consistently given the statutes by the Supreme Court of Arkansas, *Kelley* v. *State*, 133 Ark. 261, 202 S.W. 49, 54 (1918); *Stewart* v. *State*, 233 Ark. 458, 345 S.W.2d 472, 475 (1961), cert. denied 368 U.S. 935, the trial court imposed the death sentence.

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2 The petition itself also suggests, on information and belief, that Maxwell "is presently insane". At the hearing in the district court, defense counsel acknowledged that "[T]he report [from Dr. William G. Reese, Professor of Psychiatry and head of the Department of Psychiatry at the University of Arkansas Medical Center] states, in effect, that the petitioner is without psychosis. . . ." The defense's appellate brief recites that the insanity suggestion, "though dealt with by the district court in its opinion, was not pressed below and is not relevant here".

2. Maxwell appealed. On this state appeal he challenged the sufficiency of the evidence; his prosecution by information; the constitutionality in application of the penalty statute, § 41-3403; the denial of his motion that his case be removed to federal court; the overruling of certain objections relating to voir dire; the overruling of objections as to latitude in his cross-examination of witnesses; the admission of evidence; the instructions; and aspects of the prosecution's argument to the jury. All these points were decided adversely to the defense and the judgment of conviction was affirmed by a unanimous Supreme Court of Arkansas (one justice not participating). *Maxwell* v. *State*, 236 Ark. 694, 370 S.W.2d 113 (1963). No petition for certiorari was filed with the Supreme Court of the United States.[3]

3. Maxwell, with new counsel, then filed a petition for a writ of habeas corpus in the United States District Court for the Eastern District of Arkansas. In that petition, as twice amended, he alleged the illegality of his arrest; impropriety of the search of his person; impropriety of the search of his home; mistreatment by the police; coerced confessions; an adverse and hostile trial atmosphere; racial discrimination in the selection of his jury; unconstitutional application of § 41-3403; and unconstitutionality of the death penalty for rape. Judge Young decided each point so raised adversely to the defense and denied the petition. His detailed opinion is reported as *Maxwell* v. *Stephens*, 229 F.Supp. 205 (E.D. Ark. 1964).

4. Judge Young, however, granted the certificate of probable cause required by 28 U.S.C. § 2253 and stayed execution. With additional counsel from New York, an appeal

[3] This fact, of course, no longer constitutes a failure to exhaust available state remedies. *Fay* v. *Noia*, 372 U.S. 391, 435-38 (1963); *Curtis* v. *Boeger*, 331 F.2d 675 (8 Cir. 1964).

was taken to this court. We noted that, except for an early period prior to the state trial, when court-appointed attorneys were in the case, Maxwell had been represented through all the state and federal proceedings by competent, although different, non-court-appointed counsel. The points primarily argued to us were three: (1) that Maxwell was denied due process and equal protection because he was sentenced under statutes which are discriminatorily enforced against Negroes; (2) that he was denied due process and equal protection because the Garland County jury lists revealed race and were compiled from racially designated poll tax books; and (3) that the taking of Maxwell's coat and references to it in testimony at the trial violated his Fourth, Fifth and Fourteenth Amendment rights. In what we thought was an opinion meticulously concerned with the several issues raised by Maxwell, we reached the conclusion that Judge Young's decision was correct. *Maxwell* v. *Stephens*, 348 F.2d 325 (8 Cir. 1965). The late Judge Ridge dissented on the search and seizure issue concerning the coat but agreed with all the other conclusions arrived at by the majority.

5. With still another name added to the list of Maxwell's counsel, a petition for certiorari was filed. This was denied, with Mr. Justice Douglas being of the opinion that certiorari should be granted. 382 U.S. 944 (1965).

6. Execution was rescheduled but was stayed administratively until September 2, 1966.

7. Maxwell's second and present petition for a federal writ of habeas corpus was filed July 21, 1966, in the United States District Court for the Eastern District of Arkansas and came before Chief Judge Henley. The court denied the petition. *Maxwell* v. *Bishop*, 257 F.Supp. 710 (E.D. Ark. 1966).

8. The district court and a judge of this court successively declined to grant a stay of the execution or to issue a certificate of probable cause. But the Supreme Court granted leave to file a petition for a writ of certiorari, issued the writ, reversed the denial of the application for the certificate, and remanded the cause with directions to issue it. *Maxwell v. Bishop*, 385 U.S. 650 (1967). Accordingly, the certificate was issued and the execution stayed, and the case is here on appeal.

As we observed before, [pp. 327-28 of 318 F.2d], Maxwell's guilt or innocence is not in issue before us. So far as the details of the crime itself are concerned, we recite only what we said there:

> "The circumstances and details of the crime are, as usual, sordid. They are set forth in the Arkansas opinion, pp. 114-116 of 370 S.W.2d, and need not be repeated here. It suffices only to say that the victim was a white woman, 35 years old, who lived with her helpless ninety-year-old father; that their home was entered in the early morning by the assailant's cutting or breaking a window screen; that in the ensuing struggle the victim bit her assailant and caused bleeding; and that she was assaulted and bruised, her father injured, and the lives of both threatened. Confessions taken from Maxwell were not employed at the trial. The defense presented no evidence. The jury was out several hours. No question is raised as to the sufficiency of the evidence."

The Statistical Argument

Maxwell's present argument that Arkansas discriminates against Negroes in the application of the death penalty for rape, and thus violates the Equal Protection Clause and also 42 U.S.C. § 1981, rests on what is described as newly discovered evidence which became available since

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this court's disposition of Maxwell's first habeas appeal [illegible] to read, in the words of the petition:

> "This evidentiary complaint consists of the results of a survey of legal considerations during the period [illegible] in a representative sample of nineteen counties comprising more than [illegible] of the population of the State of Arkansas. The survey was conducted in the summer of 1965, as part of a study of the application of the death penalty for rape in eleven southern states. This comprehensive study required the work of 75 law students throughout the summer, the expenditure of more than $[illegible] and numerous hours of consultation time by expert criminal lawyers, criminologists and statisticians. Petitioner, who is an indigent, could not have himself at any time during the prior proceedings in his cause conducted such a study."

The record and the evidence. At a pretrial conference the district court was advised that the evidence to be presented on behalf of Maxwell was that which resulted from the survey and study so described, and that it would be presented through the testimony of Marvin Wolfgang, a criminologist-statistician on the faculty of the University of Pennsylvania. It was agreed in pretrial that the survey [illegible] individual case schedules would be made available for inspection by counsel for the State. The court ruled that, subject to subpoena and to relevancy and materiality, Professor Wolfgang would be permitted to testify as an expert and to introduce his report as a documentary exhibit. The court ruled that objections to uses of the individual case schedules [illegible]. At the evidentiary hearing the State agreed that the basic facts of the schedules, that is, the race of the victim, the race, and sex, of the individual defendant, or the alleged victim, would stand uncontroverted if Wolfgang there was called as a witness.

[illegible]

Dr. Wolfgang possesses the degree of Doctor of Philosophy in Sociology, with Criminology as a sub-field. He is Professor and graduate chairman of the Department of Sociology at the University of Pennsylvania. He is co-director of the Department's Criminological Center. He obviously is a man of scholastic achievement and of experience in his field. The State concedes that his "qualifications as a criminologist have never been questioned by the respondent".

The witness testified that in 1965 he was asked to participate in a study on capital punishment for rape and that this was suggested "as an appropriate topic for research analysis because of the underlying assumption that there is differential imposition of the death penalty in rape cases in certain states". This was to be "an effort to collect the appropriate kind of data necessary to provide some kind of empirical study, either in support of, or in rejection of, the underlying assumption. The ultimate objective of the study was to give the empirical data the appropriate kind of statistical analysis that would satisfy scientific requirements". He was informed that the result might be used in litigation on behalf of defendants who had been convicted and sentenced to death for rape.

The study was carried out in twelve states. One of these was Arkansas. For the State of Arkansas the period investigated was that from January 1, 1945, to the summer of 1965. Not every Arkansas rape case during that period was included but every case which occurred in the sample counties was included.

The study produced 55 rape convictions in the 19 selected Arkansas counties. The witness prepared a preliminary analysis of the data contained in the schedules the student investigators prepared for these cases. Among

the variables considered were race of the defendant, race of the victim, and sentence. The approach was to develop a "null hypothesis" that there is no difference in the distribution of the sentence of death or life imprisonment imposed on negro and white defendants; the calculation of a theoretical frequency, which represents the number of defendants expected to be sentenced to death if the null hypothesis is valid; the comparison of this theoretical frequency with the actual frequency in the collected data for each defendant-victim racial combination; and the determination whether the discrepancy between the expected and the observed frequencies is great enough so that, under accepted statistical standards, that discrepancy can be said to be a product of the real phenomena tested rather than of the operation of chance within the testing process. "If that difference reaches a sufficiently high proportion, then the assertion can be made that the difference is significant and could not have occurred by chance."

The data gathering was not limited to the facts of race and sentence. It included other items such as the defendant's age, family status, occupation, and prior criminal record, the victim's age, family status, occupation, husband's occupation, and reputation for chastity; aspects of the prior relationship, if any, between the defendant and the victim; the circumstances of the offense such as the number of offenders and victims, the place, the degree of threat or violence, and the injury inflicted; other offenses contemporaneously committed; the presence of third persons and threats or injury to them; the nature of the intercourse; the involvement of alcohol or drugs; and the circumstances of the trial and post trial proceedings. Data of this general kind were included because they "were felt to be relevant to the imposition of the type of sen-

tence" and "they, rather than race alone, may play a more important role in the disproportionate sentencing to death of Negro defendants convicted of raping white victims". The witness conceded that some data potentially pertinent were not collected as, for example, that "with respect to the strength of the prosecution's case" for "we had no information of that sort that we could objectively collect".

The study disclosed that, in the 55 Arkansas cases, 34 defendants were Negroes and 21 were whites; that 33 had a previous record; that 26 were known to have been in prison; that 39 victims were whites, 15 were Negroes, and the race of one was unknown; that of the victims, two had prior criminal records and 31 did not; that 16 victims had a good reputation for chastity and 6 bad; that 44 received the death sentence and 41 life; that counsel was appointed in 35 cases and retained in 9; that in 23 cases the offender was known by the victim and in 26 he was unknown; that the offender and the victim had had prior sexual relations in 4 cases; and that in 12 cases a plea of guilty was entered.

From this Arkansas data and his study Dr. Wolfgang concluded:

> 1. Factors not significantly associated with either the defendant's race or with the sentence were the place of offense, nature of entry, plea, type of counsel, duration of trial, seriousness of injury to the victim, type of prior relationship between defendant and victim; the defendant's previous record, and the victim's having dependent children.
>
> 2. Factors not significantly associated with the defendant's race were the commission of a contemporaneous offense and previous imprisonment.

3. Factors not significantly associated with the sentences were the defendant's marital status, his age, the victim's age, the display of a weapon, and the defendant's having dependent children.

4. Factors which were significantly associated with sentence were commission of a contemporaneous offense and previous imprisonment.

5. Factors which were significantly associated with the defendant's race were marital status (a greater percentage of Negroes than whites were not married), display of a weapon (more Negroes than white used one), the defendant's age (more Negroes were young), the victim's age (the defendants were white more frequently in the older-defendant-younger-victim combination), and the existence of children dependent on the defendant (more whites had them).

6. An analysis of significant association with defendant's race or the sentence was either unnecessary or not possible with respect to the victim's prior record, her reputation for chastity, the force employed, her pregnancy in the offense, prior sexual relations between the defendant and the victim, and the defendant's assertion of the defense of insanity.

The study covered other items, too, but the analysis was confined to "those particular items in which there was sufficient information to display statistically and to treat statistically".

The witness then further concluded (1) that the critical variables were race of the offender, race of his victim, and sentence; (2) compared to other rape defendants, Negroes convicted of raping white victims were disproportionately sentenced to death; and (3) "no variable of which analysis was possible could account for the observed disproportionate frequency".

On cross-examination Dr. Wolfgang stated that the Arkansas report was "preliminary" in the sense that the

other states for which data was being collected would be included in the final report; that the 55 Arkansas cases did include some new trials; that, however, he did not think this disturbed his analysis; that he was only "very little" familiar with Arkansas geography; that he was "gratified the report is as good as it is"; that he used such variables as he could get information on; that if he had had more information, he could have used other variables and his report, accordingly, would have been more extensive; that reputation for chastity was presumed to be of some relevance but "unfortunately, there was not enough information upon which to make the analysis complete"; that as a criminologist he was willing to say "that an analysis of a social system—in this case, the judicial system—operated relative to the decision making regarding rape, is such that it casts considerable doubt upon the quality of justice in those particular cases throughout the system"; and that he has never sat on a jury but has been around them.

It was then agreed that among the 55 schedules there were 4 cases which concerned defendants convicted twice for the same rape as a result of a second trial. A fifth case was not one of repeated convictions but, instead concerned two victims.

Received in evidence was an exhibit prepared by the United States Bureau of Prisons. This showed that, for the years 1930-62, 446 persons were executed under civil authority in the United States for rape and that, of these, only 45 were white but 399 were Negro and 2 were of other races, and that, for the same period, 3,298 were executed for murder and, of these, 1,640 were white, 1,619 were Negro, and 39 were of other races.

The petitioner's second and only other witness was John Monroe, a Philadelphia statistician with 17 years'

experience in sampling and surveys. He testified that he was asked by Dr. Wolfgang to design a representative sampling of counties in 12 southern states so that inferences could be drawn for each state and for the region as a whole. Arkansas was included. The 1960 negro population was used as the measure. The sample size was determined largely on speculation as to what area the law students could cover in the time available to them. Nineteen Arkansas counties were selected. These contained more than 47% of the state's population. Mr. Monroe stated that his sample of Arkansas counties was a very reliable one under the restriction, that is, the number of counties that could be investigated during the time allotted. He went on to say that, so far as the sample is concerned, the inferences drawn from it were valid for Arkansas. Garland County was not one of those selected. This was because "the random number just didn't happen to fall in the population for Garland County". Had that county possessed more than 19,000 negro population it would have been selected. The witness conceded that he was sampling the negro population and not the entire population. This was because of the purpose of the study and, in order to compare negro and white cases, the sample has to provide enough of the former to make the findings valid.

The witness stated that he took the total negro population of Arkansas and divided it by the number of draws allocated to the State. This number turned out to be approximately 19,400. A random number between it and zero was selected. As adjacent county negro population added up to the random number plus 19,400, the county was selected. In this way, counties having more than 19,400 Negroes, or approximately that number, were taken consecutively.

On cross-examination it was pointed out that this method did not result in having the selected counties geographically disbursed throughout the State. Instead, the selected counties for the most part were in the east and south. This is where Arkansas' negro population is primarily located.

The court inquired what there was about the survey that gave it validity in Garland County. The answer was that the inferences drawn from the sample were valid for the State of Arkansas. Counsel then observed that it was not Garland County that convicted Maxwell and sentenced him to death but the State, and that the purpose of Mr. Monroe's testimony was to show that the counties selected were representative of the State.

On further cross-examination, the witness acknowledged that the northwestern part of the State was essentially the white population area, that the southeastern portion was the negro population area, and that Garland County was in the white area.

The State offered no evidence.

Such is the record. It is apparent from a reading of the record that the trial court was generous in its rulings on admissibility. Everything which the petitioner presented came in.

The trial court's conclusions on the statistical argument. Chief Judge Henley, in his opinion, pp. 717-21 of 257 F.Supp., described the statistical argument as the "contention which has been urged most seriously here". He referred to Professor Wolfgang as "a well qualified sociologist and criminologist" and to Mr. Monroe as "a qualified statistician". He observed that the investigation showed three categories, namely, rapes of white women

by Negro men, rapes of Negro women by Negro men, and rapes of white women by white men, and that there was no conviction of a white man for rape of a negro woman. He noted that Dr. Wolfgang "concluded, and the Court agrees, that the differential could not be due to the operation of 'the laws of chance'". He characterized Dr. Wolfgang's conclusions "to be that a Negro man who is convicted of raping a white woman has about a 50 percent chance of receiving a death sentence, regardless of the facts and circumstances surrounding the crime, whereas a man who is convicted of criminally assaulting a woman of his own race stands about only a 11 percent chance of receiving the death sentence". He acknowledged that "the statistical evidence produced in this case is more extensive and sophisticated than has been produced heretofore". Yet he was not convinced that "it is sufficiently broad, accurate, or precise as to establish satisfactorily that Arkansas juries in general practice unconstitutional racial discrimination in rape cases involving Negro men and white women. . . . The study does not indicate that Negro men convicted of raping white women invariably or even in the majority of cases receive the death penalty. . . . Only 7 Negro men were sentenced to die for raping white women. The case studies, and the number of death sentences imposed are simply too few in number to afford convincing proof of the proposition urged by petitioner". It is not correct, as Dr. Wolfgang said in his report, that the selected Arkansas counties are "representative of the state in urban rural and white Negro population ratios". The statistics "really reveal very little about the details of the cases" where the death sentence was imposed upon Negroes for raping white women as compared with other racial situations. "On the meager material before it the Court is simply not prepared to convict Arkansas juries of unconstitutional racial discrimination in rape cases". The

court went on to observe that "In cases not involving inter-racial situations the issue of consent may be and frequently is very real"; but that that issue "is much less likely to be present in cases in which white women have been attacked by Negro men".

The petitioner's argument. The petitioner appellant characterizes the present proceeding as one presenting "for the first time in any appellate court . . . a record which is the end product of a detailed and exhaustive examination of the practical consequences of the procedures used in making the decision whether a man should live or die". It is stated that the question in this record is one of proof, namely, whether the petitioner has made a sufficient showing of racially discriminatory capital sentencing under Arkansas rape statutes. It is pointed out that on three previous occasions, namely, in the Supreme Court of Arkansas, before Judge Young, and in this court, the answer has been in the negative, "notwithstanding that on each successive occasion the evidence tended in the direction of more depth and completeness". This demonstrates, it is said, "how difficult it is for Negro litigants generally and those without means particularly, to make courts see 'the reality of the world, indeed . . . the segregated world' [citing *Brooks* v. *Beto*, 366 F.2d 1, 12 (5 Cir. 1966), cert. denied 386 U.S. 975] . . . in which they live . . . the law [needs to] 'see what all others see' ".

The heart of the petitioner's statistical argument is then forthcoming. It is that on this record the petitioner has made a prima facie case of racial discrimination in sentencing and that he is entitled to prevail when, as here, the State presents no evidence or presents evidence of insufficient moment to overcome the prima facie case so established.

It is said that the Supreme Court of necessity has developed the doctrine that a prima facie showing of unequal racial treatment, calling state procedures in question, compels the inference that the State is drawing the racial line unless it offers justification in non-racial factors for the disproportion. Jury selection and voting deprival cases such as *Hernandez v. Texas*, 347 U.S. 475 (1954), and *Gomillion v. Lightfoot*, 364 U.S. 339 (1960), are cited generally. Also cited, however, are other cases which, it is said, show that the prima facie approach has not been restricted to jury selection and voting cases. Among these are *Chambers v. Hendersonville City Bd. of Educ.*, 364 F.2d 189 (4 Cir. 1966) (reemployment of teachers), and *Cypress v. Newport News General & Nonsectarian Hospital Ass'n*, 375 F.2d 648 (4 Cir. 1967) (hospital staff membership). It is argued that there is no reason why the prima facie approach should not be applied to the present case. If there are factors which offset Dr. Wolfgang's expert conclusion, they were in the power of the State to unearth and prove. "Every justification for shifting the burden of persuasion to the State . . . applies with evident force here".

Finally, it is stated that the district court committed manifest error in its evaluation of the evidence. Counsel would dismiss the trial court's observation that the Arkansas figures contained instances of defendants tried more than once on the ground that each Arkansas jury death sentence is an indication of the application of the Arkansas statute. They would dismiss the trial court's concern with the small number of cases on the ground that the whole purpose of the statistical analysis was to satisfy Dr. Wolfgang as an expert and that he was so satisfied and his conclusions are sustainable under accepted scientific standards. They would dismiss the court's concern

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different from the instant case. We are not critical of the death penalty for rape per se to be nullified on constitutional grounds. That step in the first instance is for the Supreme Court and not for this inferior federal court. *See Rudolph v. Peyton*, 336 F.2d 128, 131 (4 Cir. 1964), cert. denied 380 U.S. 923.

The life imprisonment alternative came into the Arkansas statute by Acts 1915, No. 187, § 1, p. 771. In operation it gave the Arkansas jury the power to alleviate punishment and extend clemency in cases (rape being just one of that category) where death had been the only punishment theretofore prescribed. The 1915 statute thus was on the direction of leniency and not away from it. *Kelley v. State*, supra, p. 34 of 202 S.W.2d; *Bell v. State*, 120 Ark. 530, 180 S.W. 186, 190 (1915).

Further, the imposition of punishment by the jury, within statutorily prescribed limits, rather than by the court, is the usual routine in Arkansas criminal procedure. § 43-2145.

We reject the petitioner's argument here for a number of reasons: (a) it has no basis in legislative intent; (b) it would destroy, by indirection, a punishment which the legislature saw fit to impose, which has been a component of the State's criminal law for well over a century, and which in all that time has not been subjected to successful constitutional attack; (c) the defense in Maxwell's rape trial requested no instructional standards; (d) the jury's choice provides room for attention to the very variables which Professor Wolfgang's study concededly did not reach, and (e) we are not convinced that the absence of expressly stated standards in the statute requires that it be forthwith condemned constitutionally. Juries are not automatons. They are human beings. The jury system

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appropriately assumes that jurors in their factual determinations bring into play their common sense and the experiences of life. Their choice between capital punishment and life imprisonment, as the entire Arkansas method of punishment imposition by the jury, is not startlingly or shockingly different from the situation where choice of punishment within statutorily prescribed limits is for the judge. See *Witherspoon v. Illinois*, __ U.S. __ (1968).

The authorities proffered by the defense are the well known ones, such as *Herndon v. Lowry*, 301 U.S. 242 (1937), and *Winters v. New York*, 333 U.S. 507 (1948), which deal with vagueness in criminal statutes. But there is nothing vague, and nothing is claimed to be vague, in the substantive provisions of the Arkansas rape statutes. The petitioner's attack is directed to the punishment and not to the crime.

But it is said that *Giaccio v. Pennsylvania*, 382 U.S. 399 (1966), "supports, if it does not compel, the conclusion that unfettered jury discretion in capital cases is unconstitutional." *Giaccio* concerned an ancient Pennsylvania statute which permitted a jury to assess costs against a defendant acquitted of a criminal charge and which called for imprisonment if such costs so assessed were not so paid. The Supreme Court held that the statute was invalid under the due process clause "because of vagueness and the absence of any standards sufficient to enable defendants to protect themselves against arbitrary and discriminatory imposition of costs." P. 402. We think that the heart of the holding as to vagueness is that the offending statute "leaves the public uncertain as to the conduct it prohibits or leaves judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case." Pp.

for it." The additional argument made in *Giaccio* that state court interpretations provided appropriate standards was also unavailing. At best, these centered generally on "some misconduct" which was "not reprehensible enough for a criminal conviction but sufficiently reprehensible to deserve an equal distribution of costs."

There is no question as to what is prohibited under the Arkansas rape statute. And the secondary argument in *Giaccio* is a far cry from that Arkansas statute. Of particular import is the Court's footnote 8, p. 403 of 382 U. S., to the effect that in reaching its conclusion that the Pennsylvania statute was invalid, "we intend to cast no doubt whatever on the constitutionality of the settled practice of many States to leave to juries finding defendants guilty of a crime the power to fix punishment within legally prescribed limits." Mr. Justice Stewart, in concurring, p. 405, felt that, despite this disclaimer, much of the reasoning in the opinion served to cast doubt "upon the settled practice of many States to leave to the unguided discretion of a jury the nature and degree of punishment to be imposed upon a person convicted of a criminal offense." No other Justice joined him in that observation. We have no alternative, therefore, except to conclude that footnote 8 means what it says and that the Court did not, by its decision in *Giaccio*, cast doubt upon the constitutionality of a state practice which leaves to juries the power to fix punishment within legally prescribed limits. This thought was specifically applied later in a capital case by the majority opinion in *Spencer v. Texas*, 385 U. S. 554, 564 (1967).[1] We are not impressed with the defense's char-

[1] Nor is it contended that it is unconstitutional for the jury to assess the punishment to be meted out to a defendant in a capital or other criminal case, or to make findings as to whether there was or was not a prior conviction even though enhanced punishment is left to be imposed by the judge. The States have always been given wide leeway in dividing responsibility between judge and jury in criminal cases.

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[illegible] a "special reservation of a question" and referable "to jury sentencing and really not capital sentencing".

II. The second aspect of the argument is that the New Jersey single verdict procedure "raises the gravest questions of procedural fairness". The usual points are advanced, namely, the right to allocution, the restriction of this right in single verdict procedure, and the conflict in such procedure between that right and the right not to incriminate oneself. What is suggested is the split verdict procedure.

All these arguments were made and the same cited cases were considered when we heard en banc and decided *Hyde v. United States*, [illegible] (3d Cir. 1967), judgment vacated on other grounds, [illegible] (June 12, 1968). We recognized in that federal case that the issue was not an easy one, that it largely disappears when criminal procedure takes its traditional course and punishment is imposed by the judge rather than by the jury, and that the issue seems to suggest the possibility of the two-stage trial. There, too, as here, no request was made at the district court for a two stage trial. We stated our position and concluded that the unitary trial was not error. We felt justified in that conclusion by the Supreme

[illegible]

Court's remark in *Spencer v. Texas*, supra, p. 568 of 385 U.S.:

> "Two-part jury trials are rare in our jurisprudence; they have never been compelled by this Court as a matter of constitutional law, or even as a matter of federal procedure."

Until the Supreme Court tells us otherwise, we feel that what we said and concluded on this point in *Pope v. United States* has equal application to this state case. We adhere to the result reached on this issue in that en banc decision.

The Jury Selection Argument

This point was made on the first habeas appeal and, although it has not been raised in the state court, it was carefully considered by this court and rejected. Pp. 332-34 of 348 F.2d. The argument urged on that appeal[9] was that in Arkansas at the time of Maxwell's trial petit jurors were selected from electors; electors were persons who had paid the State's poll tax; the official list of a county's poll taxpayers and the poll tax receipts specified race; and the jury list itself indicated race. Ark. Stat. Ann. §§ 39-208, 3-104, 3-118, and 3-227(b).[10]

We reviewed the applicable Supreme Court opinions and our own earlier decisions in *Bailey v. Henslee*, supra, 287 F.2d 936, and *Henslee v. Stewart*, 311 F.2d 691 (8 Cir.

[9] We there noted, p. 332 of 348 F.2d, that on the appeal, in contrast to the situation in the district court, pp. 213-16 of 229 F.Supp., no issue was raised as to deficiencies in the efforts or methods of the jury commissioners as to under-representation of the negro race in the county jury lists, or as to any pattern of negro repeaters on the juries.

[10] Amendment No. 51 to the Arkansas Constitution, known as the "Arkansas Amendment for Voter Registration without Poll Tax Payment," effective except for one minor proviso, January 1, 1965, eliminated the poll tax requirement and with it the color references theretofore appearing in the cited statutes. *See Walker v. State*, 241 Ark. 360, 408 S.W.2d 505, 515, (1966), cert. denied, 386 U.S. 983.

1963), cert. denied 373 U.S. 907, in each of which we had concluded that a prima facie case of limitation in jury selection, because of race, had been established. But we reached the opposite conclusion in Maxwell's first appeal, primarily *because there was no proof whatsoever that the jury list was compiled from the poll tax list.* The evidence was all the other way and uncontradicted, namely, that the list was first *independently* prepared and only then was the poll tax book consulted, as if had to be in order to ascertain that the persons tentatively selected were qualified electors. We felt that we could not say that, because the poll tax receipts and books designated race, it necessarily followed that every jury list in Arkansas was automatically unconstitutional; so to conclude would ignore the possibility of the selection being initially made, as the proof in Maxwell's case showed, wholly apart from the poll tax list." We adhered to this conclusion in the later similar case, on this point, of *Mitchell v. Stephens*, supra, 353 F.2d 129, 133-34.

Presumably, Maxwell and his counsel are not convinced of the rightness of our decision on this point in the first appeal. Nevertheless, the decision was made by a unanimous panel and the Supreme Court did not see fit to disturb it. Having decided the issue, we do not now undecide it in order to reach the opposite result.

The point is repeated, moreover, by Maxwell and counsel on his second habeas petition because, it is said, the granting of certiorari, limited to five questions, in *Sims v. Georgia*, 384 U.S. 908 (1966) (the same day certiorari was denied in *Mitchell v. Stephens*, supra) and the decision in *Whitus v. Georgia*, 385 U.S. 545 (1967), require reversal.

Sims v. Georgia was also an interracial rape case with a Negro as defendant. The fourth question as to which

certiorari was granted related to the constitutionality of a conviction where "local practice pursuant to state statute requires racially segregated tax books and county jurors are selected from such books", where Negroes comprise only 5% of the jurors selected but about 20% of the taxpayers, and where the defendant offered to prove a practice of arbitrary and systematic Negro inclusion or exclusion based on jury lists of the prior ten years but his offer was disallowed. Sims' conviction was reversed and his case remanded on the ground that a voluntariness-of-confession issue was controlled by *Jackson* v. *Denno*, 378 U.S. 368 (1964), and that the Supreme Court of Georgia had erred in holding that *Jackson* was not applicable. This was the second of the five certiorari questions. The Supreme Court therefore did not reach any of the issues raised by the other four questions. *Sims* v. *Georgia*, 385 U.S. 538 (1967). The significance of the *Sims* case for Maxwell thus is that the Supreme Court was willing to grant, and did indeed grant, certiorari on a question related to racially segregated tax books, the selection of jurors from such books, the misproportion of negro jurors to negro taxpayers, and a disallowed offer of proof of arbitrary and systematic exclusion for ten years.

Merely stating the question reveals the inapplicability of the fourth Sims question to Maxwell's case. It is true that at the time of Maxwell's trial, as we have repeatedly noted, Arkansas procedure called for racially designated elector lists. But as has already been pointed out, the uncontradicted proof in Maxwell's case was that the petit jurors were not selected from those lists, although the lists were later checked, as they had to be, in order to determine that the jurors selected were qualified electors. There is no assertion here of misproportion of negro jurors

to negro taxpayers or negro electors or negro citizens. And there is nothing before us by way of claim of systematic negro exclusion on Garland County jury lists for any period of time.

Similarly, we fail to see where *Whitus* v. *Georgia* and subsequent rulings based on *Whitus*, namely, *Bostick* v. *South Carolina*, 386 U.S. 479 (1967); *Cobb* v. *Georgia*, 389 U.S. 12 (1967); *Jones* v. *Georgia*, 389 U.S. 24 (1967); *Sims* v. *Georgia*, 389 U.S. 404, 407-08 (1967); see *Coleman* v. *Alabama*, 389 U.S. 22 (1967), afford anything new or anything not fully discussed and fully decided on Maxwell's prior habeas appeal. The Georgia jury lists, under attack in *Whitus*, were made up from a racially designated tax digest and by reference to the old jury list theretofore condemned in *Whitus* v. *Balkcom*, 333 F.2d 496 (5 Cir. 1964), cert. denied 379 U.S. 931. And again there was serious disproportion of negro representation. The Court quite expectedly held that such proof constituted a prima facie case of purposeful discrimination, for the fact situation fell in line with that in *Avery* v. *Georgia*, 345 U.S. 559 (1953), cited by the Supreme Court and also by us on the first appeal, p. 332 of 348 F.2d. A construction, for Maxwell's case, of footnote material similar to that found in *Jones* v. *Georgia*, supra, at p. 25 of 389 U.S., would be contrastingly revealing. In Maxwell's case, we repeat, we have no question whatsoever of inappropriate negro representation on the Garland County jury list, we have a negro commissioner, and we have jury lists independently prepared prior to the statutorily required reference to the poll tax rolls. The jury list, thus, was not prepared from condemned or racially designated lists. The petitioner's position here would render it impossible to try a negro defendant for any crime in the State of Arkansas prior to the adoption of Amendment No. 51. On the facts such a stricture is not constitutionally required.

Sims and *Whitus* therefore fail to afford reversing precedent.

Although the point has not been raised to us, a comment relative to the Supreme Court's recent decision in *United States* v. *Jackson*, ... U.S. ... (1968), may be indicated. In *Jackson* the Court held unconstitutional the death penalty provision of the Federal Kidnaping Act, 18 U.S.C. § 1201(a). Does that holding suggest the constitutional invalidity of the Arkansas death penalty for rape, under the Fifth and Sixth Amendments which now, through the Fourteenth, have an area of application to the states? See *Malloy* v. *Hogan*, 378 U.S. 1, 8 (1964); *Gideon* v. *Wainwright*, 372 U.S. 335 (1963).

We readily conclude that *Jackson* does not require a holding of invalidity of the Arkansas death penalty. *Jackson*, as we read the opinion, pivoted on the fact that the defendant's assertion of his right to a jury trial might cost him his life, "for the federal statute authorizes the jury—and only the jury—to return a verdict of death" and thus subjects the defendant who does not plead guilty and who asks for a jury trial to the hazard of capital punishment. The Arkansas rape punishment situation is not the same. As we have pointed out above, the Arkansas procedure in criminal cases is for the jury to affix the punishment within the limits statutorily defined. § 43-2145. Although § 43-2306 provides that when a jury fails to agree on the punishment or to declare the punishment in their verdict or if they assess punishment not authorized by law, "and in all cases of a judgment on confession", the court shall assess and declare the punishment. But § 43-2108 states that a trial by jury may be waived "except where a sentence of death may be imposed". And the Supreme Court of Arkansas has spe-

cifically held in a rape case, where the defendant had entered a plea of guilty, that it was mandatory to impanel a jury to fix the punishment. *Scarber* v. *State*, 226 Ark. 503, 291 S.W.2d 241, 243 (1956). Thus, in contrast to the Federal Kidnaping Act, an Arkansas defendant, by entering a plea of guilty in a capital case, does not avoid a trial by jury on the issue of punishment. The critical choice under the federal act which occasioned the result in *Jackson*, is thus not present under the Arkansas statutes.

It is obvious, we think, that the efforts on behalf of Maxwell would not thus be continuing, and his case reappearing in this court were it not for the fact that it is the death penalty, rather than life imprisonment, which he received on his rape conviction. This fact makes the decisional process in a case of this kind particularly excruciating for the author of this opinion[11] who is not personally convinced of the rightness of capital punishment and who questions it as an effective deterrent. But the advisability of capital punishment is a policy matter ordinarily to be resolved by the legislature or through executive clemency and not by the judiciary. We note, for what that notice may be worth, that the death penalty for rape remains available under federal statutes. 18 U.S.C. § 2031; 10 U.S.C. § 920(a).

Affirmed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

---

11 Judges Vogel and Matthes do not join in this comment.

Judgment of the Court of Appeals

(Filed July 11, 1968)

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 18,746

SEPTEMBER TERM, 1967

WILLIAM L. MAXWELL,

Appellant.

—v.—

O. E. BISHOP, Superintendent of the Arkansas State Penitentiary,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF ARKANSAS

This cause came on to be heard on the record from the United States District Court for the Eastern District of Arkansas, and was argued by counsel.

On Consideration Whereof, It is now here Ordered and Adjudged by this Court that the Order of the said District Court of August 26, 1966, denying Petition for Writ of Habeas Corpus in this cause be, and the same is hereby, affirmed.

July 11, 1968

Order entered in accordance with Opinion:—

/s/ ROBERT C. TUCKER
Clerk, U. S. Court of Appeals
for the Eighth Circuit

APPENDIX B

Constitutional and Statutory Provisions Involved

ARKANSAS STATUTES ANNOTATED, §3-118 (1956):

3-118. *List of poll tax payers furnished county clerk and election commissioners.*—Not later than the 15th day of October of each year the collector shall file with the county clerk a list containing the correct names, alphabetically arranged (according to the political or voting townships, and according to color) of all persons who have up to and including October 1st of that year paid the poll tax assessed against them respectively. The correctness of this list shall be authenticated by the affidavit of the collector in person. The county clerk shall at once record the said list in a well bound book to be kept for that purpose....

ARKANSAS STATUTES ANNOTATED, §3-227 (1956):

3-227. *Evidence of right to vote—Filing and return of documents—Additional list of voters—Poll tax receipts, requirements—Certified poll tax lists—Rejection of ballots.*—No person shall be allowed to vote at any primary election held under the laws of this State, who shall not exhibit a poll tax receipt, or other evidence that he has paid his poll tax within the time prescribed by law to entitle him to vote at the succeeding general State election. Such other evidence shall be:

(a) A copy of such receipt duly certified by the clerk of the county court of the county where such tax was paid.

(b) Or, such person's name shall appear upon the list required to be certified to the judges of election by section three of Act 320 of Acts of 1909 [§3-118].

Or, if any person offering to vote shall have attained the age of twenty-one [21] years since the time of assessing taxes next preceding such election, which period of assessment is here declared to mean between the second Monday in May and the second Monday in September of each year, and possesses the other necessary qualifications, and shall submit evidence by written affidavit, satisfactory to the judges of election, establishing that fact, he shall be permitted to vote.

All such original and certified copies of poll tax receipts and written affidavits shall be filed with the judges of election and returned by them with their other returns of election, and the said judges of election shall, in addition to their regular list of voters, make an additional list upon their poll books of all such persons permitted by them to vote, whose names do not appear on the certified list of poll tax payers, and such poll books shall have a separate page for the purpose of recording names of such persons.

It shall be the duty of each elector, at the time of payment of his poll tax, to state, and it shall be the duty of the collector to record and certify in his receipt evidencing the payment of such poll tax, the color, residence, postoffice address (rural route, town or street address), voting precinct, and school district, of such person at the time of the payment of such tax, and all poll tax receipts not containing such requirements shall be void and shall not be recognized by the judges of election; provided, however, it shall not be necessary to state or have certified the street address of any such person in cities and towns where the numbering of houses is not required by the ordinances thereof.

The certified lists required by section 3 of Act 320 of 1909 [§3-118] shall contain, in addition to the name of the person paying such poll tax, his color, residence, post-

office address (rural route, town, or street address where by ordinance the numbering of houses is required), the school district and voting precinct, and such list shall be arranged in alphabetical order, according to the respective voting precincts. The county election commissioners shall supply the judges of primary elections with printed copies of such lists....

ARKANSAS STATUTES ANNOTATED §39-208 (1962):

Preparation of lists of petit jurors and alternates—Indorsement of lists.—The commissioners shall also select from the electors of said county, or from the area constituting a division thereof where a county has two [2] or more districts for the conduct of circuit courts, not less than twenty-four (24) nor more than thirty-six (36) qualified electors, as the court may direct, having the qualifications prescribed in Section 39-206 Arkansas Statutes 1947 Annotated to serve as petit jurors at the next term of court; and when ordered by the court, shall select such other number as the court may direct, not to exceed twelve [12] electors, having the same qualifications, for alternate petit jurors, and make separate lists of same, specifying in the first list the names of petit jurors so selected, and certify the same as the list of petit jurors; and specifying in the other list the names of the alternate petit jurors so selected, and certifying the same as such; and the two [2] lists so drawn and certified, shall be enclosed, sealed and indorsed "lists of petit jurors" and delivered to the court as specified in Section 39-207, Arkansas Statutes 1947, Annotated for the list of grand jurors.

Constitutional and Statutory Provisions Involved

ARKANSAS STATUTES ANNOTATED §41-3403 (1962):

41-3403. *Penalty for Rape.*—Any person convicted of the crime of rape shall suffer the punishment of death [or life imprisonment]. [Act Dec. 14, 1842, §1, p. 19; C. & M. Dig., §2719; Pope's Dig., §3405.]

ARKANSAS STATUTES ANNOTATED §43-2153 (1962):

43-2153. *Capital cases—Verdict of life imprisonment.*—The jury shall have the right in all cases where the punishment is now death by law, to render a verdict of life imprisonment in the State penitentiary at hard labor.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [redacted] 1969

No. [redacted] 13

WILLIAM L. MAXWELL,

Petitioner,

v.

O. E. BISHOP, SUPERINTENDENT,
ARKANSAS STATE PENITENTIARY,

Respondent.

BRIEF IN OPPOSITION

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IN THE

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OCTOBER TERM, 1968
No. .....

WILLIAM L. MAXWELL,
Petitioner,

v.

O. E. BISHOP, SUPERINTENDENT,
ARKANSAS STATE PENITENTIARY,
Respondent.

BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Petitioner, William L. Maxwell, was convicted in Hot Springs, Garland County, Arkansas, of the brutal and sordid rape of Miss Sylvia Spoon. Because the jury failed to recommend a llife sentence, petitioner was subsequently sentenced to death. Ark. Stat. Ann. §43-2153 (1947). While this Court is not concerned with the issue of the guilt or innocence of petitioner, respondent respectfully invites the Court's attention to the ugly facts surrounding this case as reported at pages 114 through 116 of 370 S.W. 2d.

On appeal from his conviction, a unanimous State Supreme Court affirmed the trial court. *Maxwell* v. *State,* 233 Ark. 700, 370 S.W. 2d 113 (1963). A petition for a writ of habeas corpus was filed in the United States District Court for the Eastern District of Arkansas, Pine Bluff Division, and the case fell to The Honorable Gordon E. Young. On May 6, 1964, Judge Young denied and dismissed the petition. *Maxwell* v. *Stephens,* 229 F. Supp. 205 (E.D. Ark. 1964). On appeal from the denial of the petition, the United States Court of Appeals for the Eighth Circuit affirmed the decision of the District Court, one judge dissenting. *Maxwell* v. *Stephens,* 348 F. 2d 325 (8 Cir., 1965). Certiorari was denied by this Court at 382 U.S. 944 (1965).

Alleging that new evidence had become available, a second petition for a writ of habeas corpus was filed in the United States District Court for the Eastern District of Arkansas, Pine Bluff Division. The case was lodged on the docket of The Honorable J. Smith Henley. Following an exhaustive hearing, the petition was denied. *Maxwell* v. *Bishop,* 257 F. Supp. 710 (E.D. Ark., 1966). Judge Henley further denied a certificate of probable cause for appeal to the United States Court of Appeals for the Eighth Circuit. A certificate or probable cause was also denied by United State Circuit Judge M. C. Matthes. On writ of certiorari to this Court, the denial of the certificate of probable cause was reversed and the case remanded to the Eighth Circuit Court of Appeals with directions to issue a certificate of probable cause and to hear the appeal in the normal appellate process. *Maxwell* v. *Bishop,* 385 U.S. 650 (1967).

On appeal, the lower court was again affirmed. *Maxwell* v. *Bishop,* 398 F. 2d 138 (8 Cir., 1968).

STATEMENT OF POINTS TO BE ARGUED

A. *Introduction.*

B. *The lower courts were correct in holding that the statistical data submitted by petitioner was insufficient to show racial discrimination in the imposition of the death sentence in petitioner's case.*

1.

Maxwell v. *Bishop*, 257 F. Supp. 710 (E.D. Ark., 1966)

Maxwell v. *Bishop*, 398 F. 2d 138 (8 Cir., 1968)

2.

Maxwell v. *Bishop*, 398 F. 2d 138 (8 Cir. 1968)
Wright v. *Rockefeller*, 376 U.S. 52 (1964)

C. and D. *The single verdict system used in Arkansas is not unconstitutional and there was no racial discrimination in the selection of the jury.*

Maxwell v. *Bishop*, 257 F. Supp. 710 (E.D. Ark., 1966)

Maxwell v. *Bishop*, 398 F. 2d 138 (8 Cir. 1968)

ARGUMENT

A. *Introduction*

The issues which this case now brings before the Court have been as thoroughly scrutinized by the state and federal judiciary as one case can be. The Arkansas Supreme Court, two federal district judges, two panels of the Eighth Circuit Court of Appeals, and this Court, on an earlier petition for a writ of certiorari, have all found the petitioner's allegations to be without merit.

The new evidence, which petitioner successfully alleged was a basis for filing his second petition for a writ of habeas corpus and which he now relies on in again seeking a writ of certiorari from this Court, is not in a technical sense new evidence at all. After finding that the statistics submitted to Judge Young and to the Eighth Circuit Court of Appeals and to this Court were unconvincing and legally insufficient, a more detailed study was begun at the instance of the N.A.A.C.P. Legal Defense and Educational Fund by Professor Marvin Wolfgang. The statistics which came about as the result of this later study, constitute the "new evidence" now relied on by petitioner.

B. *The lower courts were correct in holding that the statistical data submitted by petitioner was insufficient to show racial discrimination in the imposition of the death sentence in petitioner's case.*

1.

Both Judge Henley and the Eighth Circuit Court of Appeals have thoroughly discussed the statistical data

submitted by petitioner, both as to what it proves and does not prove. Respondent knows of little he can add to what those learned courts have stated with regard to the data submitted.

There are, however, certain practical aspects of this case which respondent would respectfully stress to the Court.

Respondent would first bring to the Court's attention the following statement by Judge Henley (*Maxwell* v. *Bishop*, 257 F. Supp. at p. 720):

> "In his opinion Judge Young aptly stated that the issue of consent is always involved in rape cases. In cases not involving inter-racial situations the issue of consent may be and frequently is very real; that issue from a factual standpoint is much less likely to be present in cases in which white women have been attacked by Negro men. And the disproportion between death sentences imposed on Negro men convicted in inter-racial cases and such sentences imposed in other cases may well be referable in large measure to the fact that in the former cases the trial jurors may have a firmer and more abiding conviction of the truth of the charges than in cases of the latter type."

When this consideration is viewed in the light of the other facts of this case, that petitioner never denied his guilt, the horrible circumstances surrounding the crime, and the strength of the prosecution's case, it does not take one trained in the school of psychology to imagine the abiding conviction of the defendant's guilt which this jury must have possessed.

Respondent would further point out to the Court the following excerpt from Judge Blackmun's opinion for the Court of Appeals (*Maxwell* v. *Bishop*, 398 F. 2d at p. 148):

"At oral argument we asked Professor Amsterdam, counsel for Maxwell, whether (apart from any Eighth Amendment argument) his statistical approach would not mean that it would be constitutionally impossible for a negro defendant in Arkansas ever to receive the death penalty upon conviction of the crime of rape of a white woman. The answer given us was in the affirmative, that is, that it would be constitutionally impossible. At the same time it was conceded, in contrast, that it would be possible for a white man to receive the death penalty upon his conviction for rape. When counsel was asked whether this would not be discriminatory, the reply was that once the negro situation was remedied the white situation 'would take care of itself'.

"The legal logic and the rightness of this totally escape us. If that end result would actually be forthcoming (and we wonder whether this may accurately be forecast), that fact does not, in our view, make it legally right or satisfy constitutional dictates. We still read the first section of the Fourteenth Amendment as proscribing the denial 'to any person' within a state's jurisdiction of 'the equal protection of the laws'. We feel that this means what it seems to require, namely, protection which is equal, and that equal protection is denied if, factually, a member of one race (whether black or white) is subjected, because of his race, to greater or different punishment than a member of another race. The argument therefore turns back upon and defeats the very side which here proposes it. We are not inclined to accept as constitutional doctrine and abstraction which provides equality only through assumed and hoped-for day-to-day practicalities. It is the law, not probabilities or possibilities, which must afford equal protection."

Finally respondent would make this observation to the Court: Even if we assume that the study submitted

on behalf of the petitioner raises a presumption of past instances of discrimination, in no way does this taint petitioner's trial and conviction. Petitioner was convicted in Garland County, a predominantly white area of the state, which was not one of the counties covered in the study, and he is the first negro to receive a death sentence for the crime of rape in that county. When, again, we take into account other variables, which Professor Wolfgang's study did not, such as the strength of the prosecution's case, which the record reflects was very strong here, the brutality involved, which clearly was present in the perpetration of this crime, and the lack of any defense in the petitioner's behalf, any allegation of discrimination on *this* jury's part is pure speculation.

2.

Counsel for petitioner earnestly contends that petitioner has made a *prima facie* showing of discrimination in the imposition of death sentences in rape cases, and that since this was not rebutted by the state, petitioner is entitled as a matter of law to prevail. With this contention respondent totally disagrees.

In attacking the decisions of the federal District Court and the Court of Appeals, petitioner fails to recognize that the built-in and obvious fallacies of Professor Wolfgang's study prevent a decision that a *prima facie* case has been made. Judge Blackmun well stated these fallacies in his opinion at page 146 of 398 F. 2d:

> "It is perhaps well to emphasize initially what the study and Dr. Wolfgang's testimony do not do or purport to do:
>
> "1. They do not relate specifically to Garland County where this particular offense was committed and where Maxwell was tried and convicted. They are concerned with 19 other Arkansas counties and with counties in 11 other states.

"2. They admittedly do not take every variable into account.

"3. They do not show that the petit jury which tried and convicted Maxwell acted in his case with racial discrimination.

"4. They do not deny that generally the burden of demonstrating discrimination in penalty imposition is on the one who asserts it. *Maxwell* v. *Stephens*, *supra*, p. 330 of 348 F. 2d, and cases cited; *Mitchell* v. *Stephens*, 353 F. 2d 129, 133 (8 Cir. 1965), cert. denied 384 U.S. 1019.

"What we are concerned with here is Maxwell's case and only Maxwell's case."

Despite these shortcomings, petitioner would have this Court hold that the study is a *prima facie* case merely because it was uncontradicted. Clearly, the fact that no contradictory proof was offered does not mean that Professor Wolfgang's study was or is undisputed. Respondent admitted the correctness of the "facts" but not the inferences to be drawn from those facts. And because of the fallacies of the study, respondent submits that the inference is equally strong that no discrimination was practiced in giving petitioner a death sentence. *Wright* v. *Rockefeller*, 376 U.S. 52, rehearing denied 376 U.S. 959 (1964).

C. and D. *The single verdict system used in Arkansas is not unconstitutional and there was no racial discrimination in the selection of the jury.*

Each of these points has been thoroughly and exhaustively considered and decided by Judge Henley and

by the Court of Appeals. Respondent is unable to cite to the Court any further authority than that set forth in the two lower court decisions. Therefore, respondent respectfully cites the Court to those decisions. *Maxwell* v. *Bishop*, 257 F. Supp. 710; *Maxwell* v. *Bishop*, 398 F. 2d 138.

CONCLUSION

On the basis of the foregoing argument and of the record in this case, respondent respectfully submits that certiorari should not be granted.

Respectfully submitted,

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IN THE

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OCTOBER TERM, [redacted] 1969

No. [redacted] 13

WILLIAM L. MAXWELL,

Petitioner,

—v.—

O.E. BISHOP, Superintendent of Arkansas State Penitentiary,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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APPENDIX A

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Supreme Court of the United States

Jurisdiction

Questions Presented

Constitutional and Statutory Provisions Involved

Fourteenth Amendment. (A. 9-10.) Finally, petitioner alleged that the arbitrary capital sentencing practices which he attacked had in fact resulted in arbitrary application of the death penalty by Arkansas juries for the crime of rape. Negroes convicted of the rape of white women were discriminatorily sentenced to die on account of race. (A. 5-7.)

The federal district court allowed a thorough evidentiary hearing on the racial discrimination claim. (A. 17-18.) That claim has been excluded from the present phase of the case by this Court's limited grant of certiorari (A. 161), and we need not unravel this statement by the evidence the evidence presented at the hearing. However, we shall have occasion to refer to it in the argument portions of this brief, under the principle that where a state practice is challenged as conferring arbitrary and lawless power tending to abuse in a manner forbidden by the Fourteenth Amendment, proof that the power has in fact been regularly abused is entitled to considerable weight. For this reason, as set forth in Appendix A to the brief, pp. [illegible], a detailed description of petitioner's evidence in the district court relating to a thorough and extensive empirical study of capital sentencing by Arkansas juries of rape cases during the period 1945-1965, together with the findings of the district court and of the court of appeals in reference to this study. (Appendix to be sent will hereafter be cited as App. p. [illegible].)

After hearing, the district court rendered its opinion of August 20, 1965. (A. 20-41), rejecting petitioner's contention of discrimination (A. 31-40) and upholding the Arkansas procedures of unfettered jury discretion in capital

Summary of Argument

decide a particular case, a power to determine the question of life or death that is unlike any other power possessed by a jury, or even by a court, in our legal system. The life or death decision is made utterly without standards or governing legal principles; it is made without the limitation of requisite factual findings, or of required attention to any issues or realm of fact, or of required consideration of any general rule or policy of law; it is made without any judicial control over the process or the consequence of the jurors' determination. The conscientious and fair-minded juror is given not the slightest idea what he is to do, while the covert discriminator is given absolute license to practice his biases in the matter of taking human life. This unfettered jury discretion is, rather, naked and arbitrary power, lacking every attribute of legal discretion—and is likened only to the unmanageable procedure of submitting to a jury in a civil case the unanswered question whether the defendant ought to be liable to the plaintiff; or, in a criminal case, whether the defendant has done something for which he should be punished. Such submissions are not made anywhere in American law except in the capricious decision whether [illegible] shall live or die. Thus today, the rule of law that is basic to Due Process, and especially critical in regard to the choice of life or death,

Unfettered jury discretion in capital sentencing exhibits those vices that have repeatedly been condemned by this Court under the constitutional principles forbidding indefiniteness in penal legislation. First, a capital defendant, with his life at stake, does not fairly know how to conduct his defense. He does not know how to take into consideration whether the jurors will regard mental disorder as a mitigating circumstance or an aggravating one; nor whether five jurors will think the circumstances mitigating while seven vote to kill him for it. As a result, the capital trial

is a grisly game of blind man's bluff, played for the defendant's life. Second, and more important, the conferring on the jury of "a naked and arbitrary power" (*Fisk II v. Hopkins*, 118 U.S. 356, 360 (1886)) to take a man's life for any reason or for no reason offends the principle of legality, of regularity—the principle requiring a rule of law and not of men—which the Due Process Clause asserts as a protection against laws that would otherwise be "susceptible of sweeping and improper application" (*N.A.A.C.P. v. Button*, 371 U.S. 415, 433 (1963)), "lest unwittingly or otherwise invidious discriminations are made against groups or types of individuals in violation of the constitutional guarantee of just and equal laws" (*Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942)). Due Process of Law fundamentally repudiates any such power, which "leaves . . . juries free to decide, without any legally fixed standards" (*Giaccio v. Pennsylvania*, 382 U.S. 399 (1966)), whether human life shall or shall not be forfeit, even as a punishment for crime.

II

The vices of unfettered jury discretion are compounded when the jury's life-or-death decision is made under a single-verdict procedure. Whereas unfettered discretion allows the jury arbitrary power, the single-verdict trial virtually requires that that power be exercised arbitrarily. This is so because information that is absolutely essential to rational sentencing cannot be presented to the jury except at the cost of an unfair trial on the issue of guilt or innocence, and of collateral harm to the defendant's privilege against self-incrimination.

The single-verdict capital trial is federally unconstitutional for two reasons. First, it unreasonably compels a choice between the defendant's Fifth and Fourteenth

that Due Process assuredly demands when a state empowers its jurors "to answer 'yes' or 'no' to the question whether this defendant was fit to live" (*Witherspoon v. Illinois*, 391 U.S. 510, 521 n. 20 (1968)).

ARGUMENT

Introduction: The Fact and Implications of Arbitrary Capital Sentencing

Knowledgeable observers of the administration of capital punishment in the United States agree that death is meted out among persons convicted of capital crimes in a fashion that is uneven, rationally unsupportable and arbitrary in the extreme.

"Of all the uncertain manifestations of justice, capital punishment is the most inequitable. It is primarily carried out against the destitute, forlorn and forgotten.

Members of racial and cultural minority groups suffer most. The hundreds of extraneous factors, including geography, that decide whether a convicted man will actually live or die makes capital punishment a ghastly, brainless lottery." (Dr. Louis J. West, "A Psychiatrist Looks at the Death Penalty," Paper Presented at the 122nd Annual Meeting of the American Psychiatric Association, Atlantic City, New Jersey, May 14, 1969, p. 2.)

Arbitrariness in the selection of men to be put to death takes several forms. First, there is simply the matter of baseless discrimination among individuals. Foolish, whimsical, erratic differences in the treatment of similar men guilty of similar offenses. As the Attorney General of the United States put it recently:

> "A small and capricious selection of offenders have been put to death. Most persons convicted of the same crimes have been imprisoned. Experienced wardens know many prisoners serving life or less whose crimes were equally, or more atrocious, than those of men on death row." (Statement by Attorney General Ramsey Clark, Before the Subcommittee on Criminal Laws and Procedures of the Senate Judiciary Committee, on S. 1760, *To Abolish the Death Penalty*, July 2, 1968, Department of Justice Release, p. 2.)

Those who should surely know—the respected long-time wardens of Sing-Sing and San Quentin prisons—corroborate the Attorney General. LAWES, TWENTY THOUSAND YEARS IN SING SING (1932) 302, 307-310; DUFFY & HIRSHBERG, 88 MEN AND 2 WOMEN (1962) 254-255.[9]

Second, there is economic and caste discrimination.

> "[T]he death penalty . . . almost always hits the little man, who is not only poor in material possessions but in background, education, and mental capacity as well. Father Daniel McAlister, former Catholic chaplain at San Quentin, points out that 'the death penalty seems to be meant for the poor, uneducated, and legally impotent offender.'" (DUFFY & HIRSHBERG, *op. cit. supra*, 256-257.)

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[9] See also the testimony of Clinton T. Duffy, in United States Senate, Subcommittee on Criminal Laws and Procedures of the Committee on the Judiciary, Hearings on S. 1760, *To Abolish the Death Penalty* (unprinted report of proceedings, March 20, 1968), vol. 1, pp. 44-44A: "I have often said, and I repeat here, that I can take you into San Quentin Prison or to Sing Sing, Leavenworth or Atlanta Prisons and I can pick out many prisoners in each institution serving life sentences or less, and can prove that their crimes were just as atrocious, and sometimes more so, than most of those men on the row."

Former Ohio Governor Michael DiSalle has made the same point: "I want to emphasize that from my own personal experience those who were sentenced to death and appeared before me for clemency were mostly people who were without funds for a full and adequate defense, friendless, uneducated, and with mentalities that bordered on being defective." (DiSalle, *Comments on Capital Punishment and Clemency*, 25 OHIO STATE L. J. 71, 72 (1964).)[10]

Third, there is persuasive evidence of that most corrosive and invidious form of discrimination, racial prejudice, in the selection of the men who will die. The Federal Bureau of Prisons maintains reliable statistics on executions in the United States since 1930. Between that year and 1962, the year in which petitioner Maxwell was sentenced to die, 446 persons were executed for rape in this country.[11] Of these,

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[10] See also the testimony of Michael DiSalle, in Hearings, note 9 *supra*, vol. 1, pp. 14-16. The Governor's observations are supported by those of scholars who have undertaken to describe the characteristics of men on death row in other states. E.g., Bedau, *Death Sentences in New Jersey 1907-1960*, 19 RUTGERS L. REV. 1 (1964); Johnson, *Selective Factors in Capital Punishment*, 36 SOCIAL FORCES 165 (1957). And see the study of Florida's death row population described in the Brief for the N.A.A.C.P. Legal Defense and Educational Fund, Inc., and the National Office for the Rights of the Indigent, as *Amici Curiae*, in *Boykin* v. *Alabama*, O.T. 1968, No. 642, at p. 7 n. 8.

[11] The figures below are taken from UNITED STATES DEPARTMENT OF JUSTICE, BUREAU OF PRISONS, NATIONAL PRISONER STATISTICS, No. 32, Executions 1962 (April, 1963), which was put in evidence as petitioner's Exhibit P-6 at the habeas corpus hearing below. Table 1 thereof shows the following numbers and percentages of executions under civil authority in the United States between 1930 and 1962:

	Negro	*White*	*Other*	*Total*
Rape	399 (89.5%)	45 (10.1%)	2 (0.4%)	446 (100%)
Murder	1619 (49.1%)	1640 (49.7%)	39 (1.2%)	3298 (100%)
Other	31 (45.6%)	37 (54.4%)	0 (0.0%)	68 (100%)
Total	2049 (53.7%)	1722 (45.2%)	41 (1.1%)	3812 (100%)

(Continued on p. 14)

399 were Negroes, 45 were whites, and 2 were Indians. All were executed in Southern or border States or in the District of Columbia. The States of Louisiana, Mississippi, Oklahoma, Virginia, West Virginia and the District never executed a white man for rape during these years. Together they executed 66 Negroes. Arkansas, Delaware, Florida,

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(Continued from p. 13)

Table 2 thereof shows the following numbers of executions under civil authority in the United States between 1930 and 1962, for the offense of rape, by race and state:

Jurisdiction	*Negro*	*White*	*Other*	*Total*
Federal	0	2	0	2
Alabama	20	2	0	22
Arkansas	17	1	0	18
Delaware	3	1	0	4
District of Columbia	2	0	0	2
Florida	35	1	0	36
Georgia	58	3	0	61
Kentucky	9	1	0	10
Louisiana	17	0	0	17
Maryland	18	6	0	24
Mississippi	21	0	0	21
Missouri	7	1	0	8
North Carolina	41	4	2	47
Oklahoma	4	0	0	4
South Carolina	37	5	0	42
Tennessee	22	5	0	27
Texas	66	13	0	79
Virginia	21	0	0	21
West Virginia	1	0	0	1
Total	399	45	2	446

The figures have not changed appreciably since 1963. According to the latest National Prisoner Statistics Bulletin, UNITED STATES DEPARTMENT OF JUSTICE, BUREAU OF PRISONS, NATIONAL PRISONER STATISTICS, No. 42, Executions 1930-1967 (June, 1968), p. 7, table 1, the following are the numbers and percentages of executions under civil authority in the United States between 1930 and 1967:

	Negro	*White*	*Other*	*Total*
Rape	405 (89.0%)	48 (10.6%)	2 (0.4%)	455 (100%)
Murder	1630 (48.9%)	1664 (49.9%)	40 (1.2%)	3334 (100%)
Other	31 (44.3%)	39 (55.7%)	0 (0.0%)	70 (100%)
Total	2066 (53.1%)	1751 (45.4%)	42 (1.1%)	3859 (100%)

(Continued on p. 15)

Kentucky and Missouri each executed one white man for rape between 1930 and 1962. Together they executed 71 Negroes. Putting aside Texas (which executed 13 whites and 66 Negroes), sixteen Southern and border States and the District of Columbia between 1930 and 1962 executed 30 whites and 333 Negroes for rape: a ratio of better than one to eleven. The nationwide ratio of executions for the crime of murder was considerably less startling—one Negro for each one white—but still startling enough, since Negroes constituted about one-tenth of the Nation's population during these years.

Of course, these suspicious figures might be explained, not by arbitrary and discriminatory administration of the death penalty, but by some rather extravagant hypotheses about the Negro crime rate.[12] Responsible analysts have rejected such an explanation. With virtual unanimity, commissions and individuals studying capital punishment have found

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(Continued from p. 14)
The following is the breakdown of the 435 men reported under sentence of death in the country as of December 31, 1967 (*id.*, pp. 22-23, table 10):

	Negro	*White*	*Other*	*Total*
Nine Northeastern States	33	29	0	62
Twelve North-Central States	24	31	0	55
Thirteen Western States	21	68	2	91
Sixteen Southern States	159	66	0	225
Federal	1	1	0	2
Total	238	195	2	435

[12] In fact, the number of crimes committed by Negroes appears to be three to six times higher than that which the ratio of Negroes in the population would lead one to expect. See BEDAU, THE DEATH PENALTY IN AMERICA (1964) 412. Negroes constitute one-tenth or one-ninth of the population (depending upon the time periods under consideration). So, instead of the expectable one Negro-committed crime to every nine white-committed crimes, there are three to six Negro crimes to every nine white crimes. Far more crimes numerically are obviously committed by whites than by Negroes. Yet one Negro murder convict is executed for every white murder convict executed; and *nine* Negro rape convicts are executed for every white rape convict executed. See text, *supra*.

"evidence that the imposition of the death sentence and the exercise of dispensing power by the courts and the executive follow discriminatory patterns. The death sentence is disproportionately imposed and carried out on the poor, the Negro, and the members of unpopular groups." PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, REPORT (THE CHALLENGE OF CRIME IN A FREE SOCIETY) (1967) 143. See also UNITED NATIONS, DEPARTMENT OF ECONOMIC AND SOCIAL AFFAIRS, CAPITAL PUNISHMENT (ST/SOA/SD/9-10) (1968) 32, 98; PENNSYLVANIA, JOINT LEGISLATIVE COMMITTEE ON CAPITAL PUNISHMENT, REPORT (1961) 14-15; MATTICK, THE UNEXAMINED DEATH (1966) 5, 17; BEDAU, THE DEATH PENALTY IN AMERICA (1964), 411-413; Bedau, *A Social Philosopher Looks at the Death Penalty,* 123 AM. J. PSYCHIATRY 1361, 1362 (1967); Rubin, *Disparity and Equality of Sentences—A Constitutional Challenge,* 40 F.R.D. 55, 66-68 (1966); Johnson, *Selective Factors in Capital Punishment,* 36 SOCIAL FORCES 165 (1957); Hartung, *Trends in the Use of Capital Punishment,* 284 ANNALS 8, 14-17 (1952); Garfinkel, *Research Note on Inter- and Intra-Racial Homicides,* 26 SOCIAL FORCES 369 (1949); Johnson, *The Negro and Crime,* 271 ANNALS 93 (1941).

In order to provide a more systematic and rigorous examination of the evidence of racial differentials in capital sentencing, an extensive empirical study of sentencing patterns in rape cases was undertaken in 1965 by Dr. Marvin E. Wolfgang, an eminent criminologist, at the request of counsel for petitioner Maxwell (who also represent numerous condemned men in other States). Dr. Wolfgang's study covered every case of conviction for rape in 250 counties in eleven States during the twenty-year period 1945-1965. The data gathered in Arkansas, and Dr. Wolfgang's analysis of that data, were the subject of his testimony at the habeas corpus hearing below. The testimony and the findings of

the lower courts relating to it are described in detail in Appendix A, pp. 1a-23a *infra*. We summarize them briefly here because of the importance of Dr. Wolfgang's conclusions, which confirm the earlier impressions of racial discrimination on the basis of the first fully controlled, exacting scientific study of the subject.

Dr. Wolfgang's study began with the collection of data concerning every case of conviction for the crime of rape on the docket books of nineteen randomly selected Arkansas counties, containing 47% of the State's total population, for the twenty years 1945-1965. The nineteen counties were selected by accepted areal sampling methods with the goal of producing a sample that would be representative of the State of Arkansas as a whole; and, in the opinion of the expert statistician whom Dr. Wolfgang employed to perform the sampling operation, "inferences drawn from this sample . . . are valid for the State of Arkansas." One point should be stressed. The study, from the outset, concerns cases of *conviction* for the capital crime of rape, and what is studied is the performance of Arkansas juries in selecting the convicted defendants upon whom they impose the death penalty. It thus controls completely the possibility, suggested above, that high frequencies observed in the sentencing of Negroes to die for the crime of rape might be explained by the supposition that Negroes commit rape, or are convicted of rape, more frequently than whites. This study compares the rate of death sentencing for Negro and white defendants *all of whom* have been convicted of rape.

Field researchers dispatched to Arkansas conducted an exhaustive investigation of each case where a rape conviction had been had in the sample counties. They followed a predetermined pattern for exploring the available sources of information about each case, beginning with court records, trial transcripts, witness blotters, file jackets, judicial opinions, etc., then proceeding to prison and pardon board

records, and finally to newspaper files and interviews with trial counsel. They had uniform procedures for assigning priorities to information sources in the event of conflicts; and they used a uniform schedule, with objectively defined categories, for recording the data found. At the hearing below, the State of Arkansas conceded the validity of all of the data thus gathered and recorded.

The "critical" data for each case were race of defendant, race of victim, and sentence. Dr. Wolfgang analyzed these variables and found conclusively that Negro defendants convicted of the rape of white women were disproportionately frequently sentenced to death. Applying tests of statistical significance that are generally used in the social sciences (and in other disciplines, such as medical research, as well), he found that the disproportionate frequency with which the death sentence was imposed on these Negro defendants was so great that there was a less than two per cent probability of its having occurred by chance. Put another way, if race were not really related to the capital sentencing patterns of Arkansas juries, the results observed in the twenty years between 1945 and 1965 could have occurred fortuitously in fewer than two twenty-year periods since the birth of Christ. Not surprisingly, the district court agreed with Dr. Wolfgang in finding that the markedly over-frequent sentencing to death of Negroes convicted of rape of white women "could not be due to the operation of the laws of chance."

Dr. Wolfgang next proceeded to determine whether any other ascertainable circumstance in these rape cases could account for the differential sentencing. The data gathered by the researchers included not merely race and sentence, but 28 pages of information about each case: characteristics of the defendant (age, family status; occupation; prior criminal record; etc.) and of the victim (age; family status;

occupation; husband's occupation if married; reputation for chastity); nature of the defendant-victim relationship (prior acquaintance; prior sexual relations, manner in which defendant and victim arrived at the scene of the offense); circumstances of the offense (number of offenders and victims; place; degree of violence or threat employed; degree of injury received by victim; housebreaking or contemporaneous offenses committed by defendant; presence of members of the victim's family and threats or violence employed against them; nature of intercourse; involvement of alcohol; etc.); and circumstances of the trial (plea; presentation of defenses of insanity or consent; joinder for trial of other charges against the defendant or co-defendants; whether defendant testified; nature of his legal representation (retained or appointed); etc.). Every one of these variables for which sufficient information could be gathered from the official records and other sources studied was analyzed with a view to determining whether it might explain or account for the phenomenon of racially differential sentencing. Dr. Wolfgang concluded that no non-racial variable of which analysis was possible could account for the differential observed. His ultimate conclusion was "that Negro defendants who rape white victims have been disproportionately sentenced to death, *by reason of race,* during the years 1945-1965 in the State of Arkansas."

The district court disagreed with this ultimate conclusion, but for reasons that the court of appeals appears to have thought unpersuasive and which will hardly survive scrutiny of the record. See Appendix A, pp. 19a-23a *infra.* The court of appeals itself rejected petitioner's *legal* contention of racial discrimination, for doctrinal reasons that are not now relevant; but it obviously thought that Dr. Wolfgang's *factual* finding of discrimination was not rebuttable. It expressly found that "[t]here are recognizable

indicators . . . that the death penalty for rape may have been discriminatorily applied over the decades in that large area of states whose statutes provide for it."

We have set forth this evidence of arbitrary and discriminatory capital sentencing at the outset of our argument for three reasons. First, our specific constitutional attacks upon the Arkansas death-sentencing procedures by which petitioner Maxwell was condemned are, in essence: (1) that the unfettered discretion given Arkansas juries to select between the penalties of life and death, without the guidance of standards or control by legal principles of any sort, allows wholly arbitrary deprivation of human life, in violation of Due Process, and (2) that Arkansas' single-verdict practice in capital trials in effect compels the arbitrary exercise of this arbitrary power because it deprives the defendant who exercises his privilege against self-incrimination of the opportunity to present to the sentencing jury information that is the indispensable prerequisite of rational sentencing choice. As this Court's prior decisions in several differing sorts of cases make clear, evidence that abuse has in fact occurred has a considerable bearing on the issue whether a practice challenged on the ground of lawlessness tending to abuse is susceptible to that challenge. See cases cited in note 3 *supra.*

Second, there is obviously the most intimate sort of relationship between laws maintaining the death penalty, procedures which allow its imposition arbitrarily, and racial and caste discrimination in its actual administration. In the Brief for the N.A.A.C.P. Legal Defense and Educational Fund, Inc., and the National Office for the Rights of the Indigent, as *Amici Curiae,* in the companion case of *Boykin* v. *Alabama,* O.T. 1968, No. 642, we have analyzed one aspect of that relationship: the point that the "public can easily bear the rare, random occurrence of a punishment

which, if applied regularly, would make the common gorge rise." (Id., at 55.) "A legislator may not scruple to put a law on the books whose general, even-handed, non-arbitrary application the public would abhor—precisely because both he and the public know that it will not be enforced generally, even-handedly, non-arbitrarily." (*Id.*, at 39; see generally *id.*, at 35-61.)

This is most obviously the case with regard to the death penalty for rape. Only sixteen American jurisdictions retain capital punishment for that offense. Nevada permits imposition of the penalty exclusively in cases where rape is committed with substantial bodily harm to the victim.[13] The remaining fifteen jurisdictions—which allow their juries absolute discretion to punish any rape with death—are all Southern or border States.[14] The federal jurisdiction and the District of Columbia also allow the death penalty for rape in the jury's unfettered discretion.[15] We think the

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[13] Nev. Rev. Stat. §200.363 (1967). See also §200.400 (1967) (assault with intent to rape, accompanied with acts of violence resulting in substantial bodily harm).

[14] The following sections punish rape or carnal knowledge unless otherwise specified. Ala. Code §§14-395, 14-397, 14-398 (Recomp. Vol. 1958); Ark. Stat. Ann. §§41-3403, 43-2153 (1964 Repl. Vols.); see also §41-3405 (administering potion with intent to rape); §41-3411 (forcing marriage); Fla. Stat. Ann. §794.01 (1964 Cum. Supp.); Ga. Code Ann. §§26-1302, 26-1304 (1963 Cum. Supp.); Ky. Rev. Stat. Ann. §435.090 (1963); La. Rev. Stat. Ann. §14:42 (1950) (called aggravated rape but slight force is sufficient to constitute offense; also includes carnal knowledge); Md. Ann. Code §27-463 (1967 Cum. Supp.); see also §27-12 (assault with intent to rape); Miss. Code Ann. §2358 (Recomp. Vol. 1956); Vernon's Mo. Stat. Ann. §559.260 (1953); N.C. Gen. Stat. §14-21 (Recomp. Vol. 1953); Okla. Stat. Ann. Tit. 21, §§1111, 1114, 1115 (1958); S.C. Code Ann. §§16-72, 16-80 (1962) (includes assault with attempt to rape as well as rape and carnal knowledge); Tenn. Code Ann. §§39-3702, 39-3703, 39-3704, 39-3706 (1955); Tex. Pen. Code Ann., arts. 1183, 1189 (1961); Va. Code Ann. §18.1-44 (Repl. Vol. 1960); see also §18.1-16 (attempted rape).

[15] 18 U.S.C. §2031 (1964); 10 U.S.C. §920 (1964); D.C. Code Ann. §22-2801 (1961).

relationship is obvious between this map of the legal incidence of capital punishment for rape and the discriminatory exercise of juries' discretion in the actual imposition of death sentences. It is also worth noting that, outside the United States, rape is punishable by death only in Malawi, Taiwan, and the Union of South Africa.[16]

The mediating links between the allowability on the statute books of the death penalty for a crime and its actual use against the few, arbitrarily selected outcasts yearly chosen to die are provided by the death-sentencing procedures challenged in the present case. It is these procedures by which laws of apparently uniform application are converted in practice into instruments of the most vicious discrimination. Their rare, arbitrary and discriminatory use against the poor and the disfavored insulates the laws, in turn, against fair public scrutiny and reprobation. At the same time that a capricious, *ad hoc* selection of the men to be killed makes sentencing patterns virtually immune against judicial control under the Equal Protection Clause,[17] the indefinite and arbitrary character of the sentencing procedures themselves effectively precludes constitutional control of particular death sentences rendered by individual

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[16] United Nations, Department of Economic and Social Affairs, Capital Punishment (ST/SOA/SD/9-10) (1968), pp. 40, 86.

[17] We make this point at greater length in the Brief for the N.A.A.C.P. Legal Defense and Educational Fund, Inc., and the National Office for the Rights of the Indigent, as *Amici Curiae*, in *Boykin* v. *Alabama*, O.T. 1968, No. 642, at 53-55. The opinion of the district court below presents an obvious instance of judicial inability to detect racial discrimination where it is concealed under the additional veil of *ad hoc* arbitrariness. See A. 37-40. "Obviously, a State can discriminate racially and not get caught at it if it kills men only sporadically, not too often. By being arbitrary in selecting the victims of discrimination, a State can get away with both arbitrariness and discrimination." *Boykin* Brief, *supra*, at 54.

juries.[18] If the arbitrariness and discrimination infecting the administration of the death penalty are to be regulated, it must therefore be through judicial scrutiny of the procedures that permit and encourage such arbitrariness and discrimination.

This brings us to our third point relating to the significance of the evidence of arbitrary and discriminatory capital sentencing. Herbert Wechsler has observed that: "most dramatically when life is at stake, equality is a most important element of justice." *Symposium on Capital Punishment,* 7 N.Y.L.F. 250, 259 (1961). The Fourteenth Amendment makes it an indispensable element of justice under the Constitution; and the Due Process Clause particularly is designed to assure the regularity of procedures necessary to control against uneven and unfair, arbitrary impositions upon the individual.

What is in issue in this case is the essential fairness, regularity and even-handedness required by Due Process in proceedings by which the state determines to take human life. Where the consequences of the use of those procedures are marked by what the court of appeals below acknowledged were "recognizable indicators . . . that the death penalty for rape may have been discriminatorily applied over the decades in that large area of states whose statutes provide for it" (A. 63)—where an extensive, painstaking and rigorous scientific study of the application of those pro-

[18] The opinion of the court of appeals below makes the point extraordinarily well. It rests principally on the proposition that the court cannot detect actual racial motivation on the part of the particular jury which condemned petitioner to die. See A. 59-64. Any such work of detection would, of course, be impossible because the entire absence in Arkansas law of standards governing the jury's sentencing decision precludes appraisal of the propriety of the decision, hence the inference of discrimination which might attach to an otherwise inexplicable act of impropriety.

cedures "casts considerable doubt upon the quality of justice in those particular cases throughout the system"[19]—surely the procedures which allow these uses and consequences call for the most critical and searching scrutiny of which courts are capable, to assure consistency with Due Process. Such scrutiny, as we shall now show, finds Arkansas' capital sentencing procedures drastically deficient.

I.

Arkansas' Practice of Allowing Capital Trial Juries Absolute and Arbitrary Power to Elect Between the Penalties of Life or Death for the Crime of Rape Violates the Rule of Law Basic to the Due Process Clause.

Reading the formal provisions of Arkansas statutory law governing punishment for the crime of rape, it is easy to be lulled into a quite misleading frame of mind. The statutes say, in effect, that the penalty for rape is death, except that the jury may instead elect to sentence a defendant convicted of rape to life imprisonment. ARK. STAT. ANN. §§41-3403, 43-2153 (1964 Repl. vol.), p. 3 *supra*. The image conveyed is that death is the ordinary and usual consequence of a rape conviction, while the sentence of life imprisonment is some form of extraordinary dispensation from the true course of the law.

This image is as dangerous as it is wrong. Its danger lies not primarily in the sort of simplistic legal reasoning which has sometimes been supposed to be applicable to it: that a dispensing procedure which grants a gratuitous benefit, rather than imposing a burden, escapes the con-

[19] Dr. Marvin E. Wolfgang, testifying on cross examination below (Tr. 81), quoted by the court of appeals at A. 53. Compare the phraseology of the court of appeals relative to "suspicion . . . with regard to southern interracial rape trials as a group over a long period of time." (A. 61-62.)

trol of constitutional safeguards designed to protect the individual from arbitrary and overreaching state action. We do not suppose that this Court would for a moment countenance any such legal argument.[20] The more insidious danger of the image is a subtle attitude which it engenders, that the process of decision-making by which life or death is selected as the penalty for crime is not really terribly important. The defendant, after all, has been convicted of an offense whose punishment is death—although some few defendants may be exempted from the actual necessity of dying. This attitude fosters a view of the procedures for selecting the men who will live and the men who will die, from among the total number of men convicted of capital offenses, that is both unreal and irresponsible.

We hope that there can be no doubt about the facts. The penalty for rape is not death—in Arkansas or anywhere else. Only one quarter of the total number of Arkansas rape convictions analyzed by Dr. Wolfgang resulted in a death sentence.[21] The twenty-five per cent figure is probably somewhat high even for Arkansas;[22]

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[20] The Fourteenth Amendment's requirements of fairness and equality apply not merely to such "rights" as a state is federally compelled to give its citizens, but also to the processes of dispensing such benefits as the state may choose to give them, however gratuitously. *Brown* v. *Board of Education*, 347 U.S. 483 (1954); *Watson* v. *City of Memphis*, 373 U.S. 526 (1963); *Cox* v. *Louisiana*, 379 U.S. 536, 555-558 (1965). The principle has been applied to criminal sentencing, *United States* v. *Behrens*, 375 U.S. 162 (1963), and to capital sentencing in particular, *Brady* v. *Maryland*, 373 U.S. 83 (1963). So, even if the view is indulged that Arkansas' capital sentencing procedures do no more than allow the conferring of the benefit of life to a convicted defendant, those procedures are nonetheless constrained by the Due Process and Equal Protection Clauses, as *Brady* squarely holds.

[21] See Petitioner's Exhibit P-4, Appendix B, table 1. There were fourteen death sentences imposed in a total of fifty-five cases.

[22] The fifty-five cases mentioned in the preceding footnote are all of those analyzed by Dr. Wolfgang. A few cases found on the

and it appears far higher than the percentage of rape convicts who are sentenced to death in other states where the offense is potentially capital.[23] It is also true that the penalty for first-degree murder is not death—in Arkansas or anywhere in the United States.[24] By far the greater number of first-degree murder convicts, like rape convicts, are sentenced to some punishment other than death.[25] The testimony of Attorney General Clark, quoted at p. 12 *supra*, was neither heedless nor uninformed: "Most persons convicted of the same crimes [for which "a small and capricious selection of offenders have been put to death"] have been imprisoned."

What is important here is not the respective percentages of men sentenced to life and to death (we shall recur to their significance shortly), but rather the point that a highly selective process of making individuating judgments is occurring, called forth by a state's statutes which give its juries the option between a death sentence and something less. This process begins at the point of a defen-

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docket books could not be analyzed, because information relating to the critical variables was not discoverable. These were ordinarily non-death cases, since official record-keeping in death cases tends to be more fulsome.

[23] See Appendix B, pp. 24a-34a *infra*.

[24] The death penalty for first-degree murder is no longer mandatory anywhere in the United States. See BEDAU, THE DEATH PENALTY IN AMERICA (1964) 27-30, 45-52.

Indeed, there are very few crimes in the United States today that carry a mandatory death penalty, and those few are for the most part of the obscure sort under which no one is ever charged (treason, in several states; perjury in a capital case, etc.). See *ibid.* And see KALVEN & ZEISEL, THE AMERICAN JURY (1966) 301, 435; Hartung, *Trends in the Use of Capital Punishment*, 284 ANNALS 8 (1952); Knowlton, *Problems of Jury Discretion in Capital Cases*, 101 U. PA. L. REV. 1099 (1953).

[25] See Appendix B, pp. 24a-34a *infra*.

dant's conviction for a capital crime; it applies to all defendants so convicted; and it involves the making of differentiations between them, choosing those ones among their total number whose lives are to be taken.

The question is not worth debating whether the Fourteenth Amendment's basic requirements of regularity, fundamental fairness, and even-handedness operate as constraints upon such a process of selection. Obviously, they do. *Witherspoon* v. *Illinois*, 391 U.S. 510 (1968); *Brady* v. *Maryland*, 373 U.S. 83 (1963). And see *Specht* v. *Patterson*, 386 U.S. 605 (1967); *Mempa* v. *Rhay*, 389 U.S. 128 (1967); *Skinner* v. *Oklahoma*, 316 U.S. 535 (1942). As Judge Sobeloff has written in another connection:

> "Under our constitutional system, the payment which society exacts for transgression of the law does not include relegating the transgressor to arbitrary and capricious action." (*Landman* v. *Peyton*, 370 F.2d 135, 141 (4th Cir. 1966).)

The issue is whether the selection process used by the State of Arkansas—and by most other American states which retain capital punishment, we must add—comports with the relevant Fourteenth Amendment constraints or "relegates the transgressor to arbitrary and capricious action" in the manner of deciding whether he lives or dies.

We therefore pass to an examination of the Arkansas process.

A. *The Power Given Arkansas Juries Is Essentially Lawless.*

1. ARK. STAT. ANN. §41-3403 (1964 Repl. vol.), p. 3 *supra*, fixes the punishment for rape as death. Pursuant to ARK. STAT. ANN. §43-2153 (1964 Repl. vol.), p. 3 *supra:*

> "The jury shall have the right in all cases where the punishment is now death by law, to render a verdict of life imprisonment. . . ." [26]

This option conferred upon the jury is the exclusive method of selecting, among convicted capital offenders, the ones who die. A jury trial may not be waived in a capital case in Arkansas. ARK. STAT. ANN. § 43-2108 (1964 Repl. vol.); *Scarber* v. *State*, 226 Ark. 503, 506, 291 S.W.2d 241, 242-243 (1956).

2. The only procedural requisite for valid exercise of the option is that the jury must be told it has a choice between life imprisonment and death.[27] It is apparently sufficient, to meet this requirement, that the court hand the jury alternative life and death verdict forms, identify them, and tell the jury it may use either. *Smith* v. *State*, 230 Ark. 634, 642-643, 324 S.W.2d 341, 346 (1959). The Arkansas Supreme Court has expressly approved submission of the penalty option to the jury under instructions which do nothing more than tell the jury it has a choice. *Hays* v. *State*, 230 Ark. 731, 736, 324 S.W.2d 520, 523-524 (1959) ("' . . . it will be your duty to assess the punishment. The punishment for murder in the first degree is

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[26] The predecessor of this section, first giving juries capital sentencing discretion in Arkansas, was enacted in 1915. Arkansas Acts 1915, No. 187, §1, at p. 774.

[27] *Alford* v. *State*, 223 Ark. 330, 266 S.W.2d 804 (1954); *Smith* v. *State*, 205 Ark. 1075, 172 S.W.2d 248 (1943); *Crowe* v. *State*, 178 Ark. 1121, 13 S.W.2d 606 (1929); *Webb* v. *State*, 154 Ark. 67, 242 S.W. 380 (1922). In murder cases, it is also required that the jury be told to determine the degree of the offense; and an explicit first degree verdict is necessary to support a death sentence. *Walton* v. *State*, 232 Ark. 86, 334 S.W.2d 657 (1960); *Jones* v. *State*, 204 Ark. 61, 161 S.W.2d 173 (1942); *Ray* v. *State*, 194 Ark. 1155, 109 S.W.2d 954 (1937); *Wells* v. *State*, 193 Ark. 1092, 104 S.W.2d 451 (1937); but see *Burns* v. *State*, 155 Ark. 1, 243 S.W. 963 (1922).

death by electrocution or, at the option of the jury, imprisonment in the penitentiary for the term of his natural life.'"); *Hodges* v. *State,* 210 Ark. 672, 674, 197 S.W.2d 52, 53 (1946) ("'Gentlemen of the jury, if you wish to return a verdict of guilty and fix the punishment at death, your verdict will be [reciting verdict form]: . . . If you wish to return a verdict and fix the punishment at life imprisonment, you will return the following verdict [reciting verdict form]. . . .'").[28] No Arkansas cases have been found in which more elaborate instructions were given.

3. Arkansas Supreme Court decisions describing the nature of the option given to the jury are little more informative. They do no more than to recite the obvious propositions that: "The legislature evidently meant for the jury to exercise its discretion in selecting the punish-

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[28] In *Boone* v. *State,* 230 Ark. 821, 825-826, 327 S.W.2d 87, 89-90 (1959), the jury interrupted its deliberations to inquire of the judge which was the maximum penalty in law, life imprisonment or death. The following transpired:

> "'By the Court: No, no, sir the law doesn't say. The law simply says that the penalty shall be life imprisonment in the event of a finding of guilty, or the penalty shall be death in the event of a finding of guilty. It leaves it to the jurors to decide which of these penalties shall be inflicted.'
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> . . .
>
> "'By the Court Reporter: (Reading) Gentlemen of the Jury, you have asked the court to tell you at this state of your deliberations which is considered in law to be the most severe penalty. Whether it is death by electrocution, or whether it is life imprisonment. Our statutes provide that every person convicted of murder in the first degree shall suffer death or life imprisonment. It is for you, the jury, to say which of these two penalties should be inflicted, the severity of either of those punishments is a matter for each of you to decide to your own satisfaction.
>
> "'By the Court: Gentlemen, are there any other questions?
>
> "'By Member of the Jury: You didn't help us much.
>
> "'By the Court: I am sorry, but I have got to go by the law.'"

ment . . ." (*Needham* v. *State,* 215 Ark. 935, 939, 224 S.W.2d 785, 787 (1949); see *Webb* v. *State,* 154 Ark. 67, 72-75, 242 S.W. 380, 383-384 (1922)), and that "this option lies entirely with the jury." *Alford* v. *State,* 223 Ark. 330, 332, 266 S.W.2d 804, 805 (1954)). The only Arkansas case found which discourses more fully on the nature of the option is *Scarber* v. *State,* 226 Ark. 503, 505, 291 S.W.2d 241, 242 (1956), where the Supreme Court said that a jury charge requiring that the jurors not impose the death penalty unless satisfied beyond a reasonable doubt that the defendant should receive it "placed a greater burden on the state than it was required to assume under the law."

4. One point is quite clear however. The jury's judgment is entirely unreviewable.[29] Although the Arkansas Supreme Court has spoken of its power to "reduce a punishment imposed upon the verdict of a jury . . . on account of . . . excessive punishment," *Blake* v. *State,* 186 Ark. 77, 80-82, 52 S.W.2d 644, 646 (1932), it has repeatedly made clear that this power may be exercised to reduce a death sentence only where (as in *Blake*) the evidence is insufficient to sustain a jury verdict of *conviction* of the capital charge. E.g., *Smith* v. *State,* 230 Ark. 634, 643-644, 324 S.W.2d 341, 346 (1959).[30] Otherwise, with regard to the death penalty, "as we have many times stated, the matter of assessing punishment is strictly within the province of the jury, and we have no power

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[29] "The statute gives the jury, and not the court, the right to reduce the punishment. . . ." *Burns* v. *State,* 155 Ark. 1, 8, 243 S.W. 963, 967 (1922) (dictum). *Accord: Webb* v. *State,* 154 Ark. 67, 72, 242 S.W. 380, 383 (1922) (dictum).

[30] Where the evidence will not support conviction on the capital charge but will support conviction of a lesser included offense, the Arkansas Supreme Court reduces the penalty to that provided by law for the lesser offense. This is not, of course, review of the sentence but of the conviction.

to change the fixed punishment unless the proof fails to sustain the charge for which the defendant is convicted." *Nail* v. *State*, 231 Ark. 70, 85, 328 S.W.2d 836, 845 (1959). *Accord: Smith* v. *State*, 230 Ark. 634, 324 S.W.2d 341 (1959); *Young* v. *State*, 230 Ark. 737, 324 S.W.2d 524 (1959); *Hildreth* v. *State*, 215 Ark. 808, 223 S.W.2d 757 (1949); *Rorie* v. *State*, 215 Ark. 282, 220 S.W.2d 421 (1949); *Palmer* v. *State*, 213 Ark. 956, 214 S.W.2d 372 (1948); *Allison* v. *State*, 204 Ark. 609, 164 S.W.2d 442 (1942); *Turnage* v. *State*, 182 Ark. 74, 30 S.W.2d 865 (1930).[31] See also *Hays* v. *State*, 230 Ark. 731, 324 S.W.2d 520 (1959); *Hodges* v. *State*, 210 Ark. 672, 197 S.W.2d 52 (1946).[32] This powerlessness of the Arkansas Supreme Court to review a death sentence stands in sharp contrast to its freely exercised power to reduce jury-fixed sentences in non-capital cases.[33]

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[31] The only death case in which the Arkansas Supreme Court has ever assumed to reduce the penalty without upsetting the conviction is *Davis* v. *State*, 155 Ark. 245, 244 S.W. 750 (1922). In *Davis*, the Supreme Court disbelieved the complaining witness in a rape case and responded by granting clemency to the defendant. Its power to do so was later repudiated, and *Davis* expressly overruled, in the *Allison* case, text *supra*, 204 Ark., at 614; 164 S.W.2d, at 445.

[32] It is in the context of this line of decisions that one must read the phrase in *Ezell* v. *State*, 217 Ark. 94, 102, 229 S.W.2d 32, 36 (1950), declining to reduce a death sentence fixed by a jury, "if it be conceded that we have such power." See also *Black* v. *State*, 215 Ark. 618, 625, 222 S.W.2d 816, 820 (1949).

[33] *Carson* v. *State*, 206 Ark. 80, 173 S.W.2d 122 (1943); *Hadley* v. *State*, 205 Ark. 1027, 172 S.W.2d 237 (1943); *Marks* v. *State*, 192 Ark. 881, 95 S.W.2d 634 (1936); *Ball* v. *State*, 192 Ark. 858, 95 S.W.2d 632 (1936); *Hudspeth* v. *State*, 188 Ark. 323, 67 S.W. 2d 191 (1934). Even where the court refuses to reduce a jury-fixed non-capital sentence, it does not talk of lack of power; it finds no "abuse of discretion" by the jury, *Cook* v. *State*, 225 Ark. 1003, 287 S.W.2d 6 (1956); *Wilkerson* v. *State*, 209 Ark. 138, 189 S.W.2d 800 (1945); *Cheney* v. *State*, 205 Ark. 1049, 172 S.W.2d 427 (1943), and concedes that "we may reduce extreme penalties when not supported by the evidence," *Smith* v. *State*, 194 Ark. 1041, 1045, 110 S.W.2d 24, 26 (1937).

5. Describing the Arkansas death-sentencing practice, used at petitioner Maxwell's trial, the district court below wrote:

> "It may be conceded that the Arkansas statutes dealing with rape and dealing with capital punishment do not purport to set up any standards by which the jury is to exercise its discretion in determining whether it should exercise the power conferred upon it by section 43-2153, and it will be assumed that no such standards are to be found in the reported decisions of the Supreme Court of Arkansas. Nor did the Circuit Court in its charge to the jury attempt to lay down any principles which should be applied in determining whether petitioner, if convicted, should be punished by life imprisonment rather than by death." (257 F. Supp. at 716; A. 30.)[34, 35]

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[34] Although the transcript of petitioner's state trial has not been included in the materials certified to this Court by the Court of Appeals for the Eighth Circuit, it was before the District Court in petitioner's earlier federal habeas corpus proceeding, see 229 F. Supp. 205, and hence by agreement available to the district court in the present proceeding (A. 17). The district court refers to it in the quoted passage, and in stating, for example, that petitioner did not testify at his trial (A. 41). The Court of Appeals sent for the transcript while the appeal was under submission, and its opinion refers explicitly to it (A. 59, n. 5). For the information of the Court, we set forth in Appendix C the manner in which the sentencing option was submitted to petitioner's trial jury.

[35] In a footnote to this passage, the district court adds: "It does not appear that counsel for petitioner requested any instructions on the subject." (257 F. Supp. at 716, n. 6; A. 30, n. 6.) The court of appeals also noted that "the defense in Maxwell's rape trial requested no instructional standards." (398 F.2d, at 149; A. 65.) But neither court found that petitioner had thereby committed the sort of intentional bypassing required to forfeit federal claims under *Fay* v. *Noia*, 372 U.S. 391 (1963); and no such finding could be made. Petitioner's constitutional complaint is that there are no standards fixed by Arkansas law to govern the jury's death-penalty decision, and in the absence of such standards,

We note the salient characteristics of the death-sentencing process just described.

First, the objective of the process is to differentiate among individuals, in order to select from the total number of men convicted of rape those who will live and those who will die. The purpose for which this differentiation is made is the most arcane, the most intractable judgment known to the criminal law. "It should be understood that much more is involved here than a simple determination of sentence. For the State . . . empowered the jury in this case to answer 'yes' or 'no' to the question whether this defendant was fit to live." *Witherspoon* v. *Illinois,* 391 U.S. 510, 521 n. 20 (1968).

The ends thought to be served by capital punishment—hence, the considerations which bear on the fitness of prescribing it in a particular case—are variable, and hardly a matter controlled by consensus or enlightened by the commonly shared values of our society. Arkansas' legislature has not identified the ends which it thinks worthy of consideration in support of its general decision to retain the death sentence for the offense of rape; nor has it proscribed consideration of whatever other ends may occur to individual men sitting in judgment in rape cases. The sentencer is informed only by his personal intuition and particularistic experience concerning the goals in whose interest he is empowered to kill other men. Sentencing in non-capital cases—however complex the judgments it may require—at least rests upon the common assumption that the offender is to be salvaged if he is salvageable consistently with community protection. Capital sentencing

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counsel could not have conceived what to request the court to charge on the issue. Surely, counsel was not required to make up his own standards, in order to supply the deficiency of Arkansas' legislation.

rejects that assumption, in the case of some men but not others, without explaining who or why.

Second, the consequences to the individual who is sentenced to die are far less recondite than the objectives which may, or may not, underlie the decision to kill him. "Whatever the differences on which this decision hinges, they remain demeaningly trivial compared to the stakes." KALVEN & ZEISEL, THE AMERICAN JURY (1966) 448-449. The enormity of the stakes is altogether obvious.[36]

Third, the range of cases and convicted defendants subject to the selection process, and among whom it operates to differentiate, is extraordinarily broad. The crime of rape in Arkansas (as in other states where it is capital) encompasses every variety of consummated sexual assault, whether on a child or a mature woman, whether the victim is brutally injured or physically unharmed, whether the assailant is a prowling stranger or the victim's social companion.[37] The range of capital murder cases is similarly

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[36] We think we need not elaborate the point before this Court, which has so frequently recognized it. *Witherspoon* v. *Illinois*, 391 U.S. 510, 521 n. 20 (1968); *Hamilton* v. *Alabama*, 368 U.S. 52 (1961); *Williams* v. *Georgia*, 349 U.S. 375, 391 (1955); *Stein* v. *New York*, 346 U.S. 156, 196 (1952); *Chambers* v. *Florida*, 309 U.S. 227, 240 (1940); *Powell* v. *Alabama*, 287 U.S. 45 (1932).

[37] The Arkansas statute in effect from 1842 until 1967 defined rape in terms of Blackstone's venerable formulation as "the carnal knowledge of a female, forcibly, and against her will." ARK. STAT. ANN. § 41-3401 (1964 Repl. vol.). But, in this formulation, "forcibly" means nothing more than the degree of force necessary to achieve intercourse, and "against her will" signifies only "without her consent." This is the doctrine generally followed by states which retain the common-law formulation of rape, see PERKINS, CRIMINAL LAW (1957) 110-112, 119-127; and it is the rule announced by the Arkansas cases. *McDonald* v. *State*, 225 Ark. 38, 279 S.W.2d 44 (1955); *Fields* v. *State*, 203 Ark. 1046, 159 S.W.2d 745 (1942); *Davis* v. *State*, 155 Ark. 245, 244 S.W. 750 (1922); *State* v. *Peyton*, 93 Ark. 406, 125 S.W. 416 (1910); *Harvey* v. *State*, 54 Ark. 425, 14 S.W. 645 (1890).

In 1967, Arkansas enacted a new statute dividing rape into degrees but not materially affecting the nature of the charge which

broad.[38] It is quite inconceivable that the legislature which authorized the death penalty in all of these cases thought that it should be used in very many of them. And, indeed, it is used in practice in only a relatively small number.[39] The prescription of the death penalty, with its discretionary incidence, is therefore a striking example of purposive overbreadth—that style of legislation which sweeps far more broadly than its intended target, leaving to *ad hoc* judgment in administration the job of deciding what that target shall be.[40]

Fourth, in the case of the death penalty, the instrument of administration is the lay jury, selected to try a partic-

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constitutes the capital degree. Arkansas Acts 1967, No. 362, p. 830, codified as ARK. STAT. ANN. §41-3401 (1968 Cum. Supp.). First degree rape, which is capital, consists of sexual intercourse with a female "by forcible compulsion," or where the female is "incapable of consent by reason of being physically helpless, or mentally incapacitated," or is less than eleven years old. Second and third degree rape, which are non-capital, involve intercourse, whether or not consensual, with females under the ages of 14 and 16 respectively.

[38] Arkansas has the common form of first degree murder statute, ARK. STAT. ANN. § 41-2205 (1964 Repl. vol.), encompassing murders by poison or lying in wait, felony-murders (arson, rape, robbery, burglary or larceny), and deliberate and premeditated murders. The State follows the widely accepted notion that "premeditation and deliberation to do murder may be formulated in the assailant's mind upon the instant. It does not have to exist in the mind an appreciable length of time." *Nail* v. *State*, 231 Ark. 70, 75, 328 S.W.2d 836, 839 (1959). *See House* v. *State*, 230 Ark. 622, 324 S.W. 112 (1959); *Jenkins* v. *State*, 222 Ark. 511, 261 S.W.2d 784 (1953); *Gilchrist* v. *State*, 100 Ark. 330, 140 S.W. 261 (1911); *Rosemond* v. *State*, 86 Ark. 160, 110 S.W. 229 (1908); *Green* v. *State*, 51 Ark. 189, 10 S.W. 266 (1889). Consequently, as Mr. Justice Cardozo pointed out many years ago, the line between second and first degree murder is paper thin; and virtually all murders are potential first degree cases if the jury takes that view of them. CARDOZO, LAW AND LITERATURE (1931) 97-101.

[39] See Appendix B, pp. 24a-34a *infra*.

[40] This Court has pointed out that such legislation is inherently "susceptible of sweeping and improper application." *N.A.A.C.P.* v. *Button*, 371 U.S. 415, 433 (1963).

ular case. In pointing out this circumstance, we imply no general criticism of trial by jury. Recognition of the unique virtues of jury trial, see *Duncan* v. *Louisiana*, 391 U.S. 145 (1968), does not preclude the simultaneous recognition that jury trial also has certain peculiar dangers, requiring especial safeguards under the Constitution. See *Jackson* v. *Denno*, 378 U.S. 368 (1964); *Rideau* v. *Louisiana*, 373 U.S. 723 (1963); *Bruton* v. *United States*, 391 U.S. 123 (1968). And it can hardly be doubted that the jury system, for all of its merits, is that form of judicial process which is least capable of developing uniform and consistent rules of decision.[41]

Comparison of the jury with a sentencing judge is instructive in this regard—and none the less because sentencing by judges in this country has itself fallen far short of the marks of regularity and even-handedness.[42] The judge, at least, is a professional sentencer. The very fact that he sentences a considerable number of offenders promotes some consistency in their sentencing, even if it be only the consistency of his habits. In the process, hopefully, he gains some generalizable experience, develops bases for rational comparative judgments; in any event, minimally, he evolves a "feel" for how the cases "line up." As a professional, he is somewhat better guarded against unexamined visceral urges and inflammable emotions than are

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[41] The point has been succinctly stated, with particular reference to jury sentencing, by the cognizant Task Force of the National Crime Commission. "[T]he transitory nature of jury service virtually precludes rational sentencing." PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS (1967) 26.

[42] See, e.g., Rubin, *Disparity and Equality of Sentences—A Constitutional Challenge*, 40 F.R.D. 55 (1966); INSTITUTE OF JUDICIAL ADMINISTRATION, DISPARITY IN SENTENCING OF CONVICTED DEFENDANTS (1954).

lay jurors.[42] He shares with other judges and sometimes with corrections personnel a sense of common enterprise and responsibility in regard to sentencing offenders that can be, and often is, a regularizing influence. He talks with other judges; lawyers talk to him about his sentencing practices and theirs; he has contact with corrections people; and he can be affected, as well, by more formal controls and guides:—occasional instances of appellate sentencing review or expressed disapprobation, sentencing conferences and councils, etc. Notwithstanding all of these moderating forces, as we have said, judicial sentencing often is extremely erratic. How much more erratic and uneven then must jurors natively tend to be, who are subject to not a single one of the controls working on the judge? A unique array of twelve untrained individuals assembles; hears one case; sentences one man; then disperses. We repeat that we would not in the least disparage jurors' functioning in this fashion to decide issues—whether factual, judgmental or moral—adequately framed by uniform rules of law. But the prospect that, *without rules*, the jurors will themselves supply uniformity or regularity, is hopeless.

Fifth, in making its selection of the men to die, out of all those convicted, the jury is ordinarily deprived by Arkansas' single-verdict procedure of information that is necessary to any sort of rational selective judgment. We develop this point independently in Part II, pp. 66-78 *infra;* but it must be considered, together with the points made

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[42] "The judge very often perceives the stimulus that moves the jury, but does not yield to it. Indeed it is interesting how often the judge describes with sensitivity a factor which he then excludes from his own considerations. Somehow the combination of official role, tradition, discipline, and repeated experience with the task make of the judge one kind of decider. The perennial amateur, layman jury cannot be so quickly domesticated to official role and tradition; it remains accessible to stimuli which the judge will exclude." KALVEN & ZEISEL, THE AMERICAN JURY (1966) 497-498.

in paragraphs *First* through *Fourth* above, as composing the background and concrete setting within which Arkansas juries exercise the "option" or "discretion" allowed them in capital sentencing. Having sketched the background, we now come to that "discretion," which is the nub of our constitutional complaint.

Sixth, the power of life-or-death decision given to the jury is absolutely lawless. It is a raw, arbitrary power to kill or to let live, unguided by principle, undirected by concern for specified relevant facts, uncontrolled by any general rules of law, unleashed of any requirement that it be exercised pursuant to valid reasons or even to agreed-upon reasons (since the twelve jurors may vote to kill for twelve disparate reasons), and uncontrollable, unreviewable by any other power in the legal system. It is, simply, the power to take away a convicted man's life for any reason (good or bad, rational or irrational, generally applicable or trotted out for the occasion) or for no reason at all—on a whim, a caprice—or because the defendant did not take the witness stand; because he took the stand, slanderously claimed consent, and was disbelieved; or because of the color of his skin.

Let us examine more closely the nature of this extraordinary "discretion."

> (1) Its exercise is not required to rest upon any prerequisite findings of fact. Such findings, of course, are required to support virtually every other judgment of a jury in our legal system. "If you find that the defendant did strike the plaintiff with his car . . ."—thus runs the archetypal jury charge. The requirement of factual findings serves both to guide the conscientious juror and to provide a basis for judicial control by review of the unconscientious one. But a death-sentencing jury need find no facts, either of a specific

sort (for example, that the rape resulted in substantial bodily harm to the victim;[44] or that the defendant has been convicted, or has committed, other rape offenses[45]), or of a more general sort (for example, that the defendant is a likely rape recidivist, or that he is incapable of rehabilitation).

(2) Nor is there any legal prescription, to guide the jury or enable review of its judgment, of any *preclusive* factual findings: circumstances that exclude the death penalty (for example, the defendant's youth; or conduct by the victim which led the defendant on).

(3) Nor is the jury required to consider, or to take account of, any specified facts or concerns.

(4) Nor is there any enumeration, for the jurors, of specified facts or concerns which they *may* consider. The jury's attention is not directed to any range or realm of available factual or judgmental considerations.

(5) Nor is there enumeration and proscription of *im*permissible considerations. The jury is not told that it may not sentence the defendant to death for his unregenerate bad taste in taking the stand and perjuriously claiming consent; or for not taking the stand.

(6) There is no prescription of guiding criteria, legal norms, standards or principles for judgment. In

[44] The State of Nevada requires such a finding as the precondition of the imposition of a death sentence in a rape prosecution. See note 13 *supra*.

[45] This is the sort of finding required to support the imposition of the harsher penalty allowable under common state legislation dealing with recidivists.

some areas of law, where legal doctrine can do no better, jurors are permitted to employ such general standards as "reasonable care" or "the conduct of a reasonable man." These standards are imprecise, but they *are* standards; they serve to tell the jury what the law has determined is the test or benchmark by which the defendant is to be judged. The defendant is liable to the plaintiff if he did not act with the degree of care which a reasonable man would have employed; the jury may decide (within limits) what that degree of care is, but they are told that they must not find against the defendant if he exercised it. No equivalent guidance is provided to the death-sentencing jury. It may—indeed, it must—make up its own governing principles, which may or may not be those that other juries apply to other convicted men. In fact, not even this much rational deliberation is required, for it is illusory to speak about the death-sentencing "jury" and "its" governing principles. The jurors are not directed or required to discuss or to agree upon any common set of principles; and the court's instructions (unlike even such formulations as the "reasonable man") give them nothing to focus any such discussion.

> "The precise point which prompts the penalty in the mind of any one juror is not known to us and may not even be known to him. Yet this dark ignorance must be compounded twelve times and deepened even further by the recognition that any particular factor may influence any two jurors in precisely the opposite manner.
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> " . . . Such factors as the grotesque nature of the crime, the certainty of guilt, or the arrogant behavior of the defendant may conceivably have assured the death penalty. . . . Yet who can say

that these very factors might not have demonstrated to a particular juror that a defendant, although legally sane, acted under the demands of some inner compulsion and should not die? . . ." (*People* v. *Hines*, 61 Cal.2d 164, 169, 390 P.2d 398, 402, 37 Cal. Rptr. 622, 626 (1964).)

(7) There is no prescription even of the ultimate legal goals and purposes to be considered in the formulation of criteria to guide the death-sentencing decision. Anglo-American law addresses its vaguest sort of directions to courts in such matters as child custody cases, where the "best interests of the child" or some equivalent formulation is the touchstone, or in economic regulation, where "unreasonable" restraints of trade are forbidden. Death-sentencing jurors have not even the direction and delimitation, the concentration of attention upon specified general objectives, which these vague formulations comport. Rather, the power of life-or-death decision is wholly unguided and unconstrained, unlike any other decision made by a lawful tribunal within our legal traditions.[46] It can only be likened to the power that would be conferred by a practice—inconceivable in any American court—of submitting to a jury in a civil case the naked ques-

[46] See KALVIN & ZEISEL, THE AMERICAN JURY (1966) 435:

"The discretion which the [death-sentencing] jury in the United States is asked to exercise is, it should be emphasized, striking: there is neither rule nor standard to guide it. For this reason, comparison of judge and jury decision must here depart from the standard pattern of analysis which discussed disagreement in terms of why the jury differed from the judge. We have viewed the latter [in all sorts of other legal judgments] as a kind of baseline representing the law, and we have tried to trace the nuances of jury judgment as it deviated from the legal norm of the judge. For the death penalty, however, the judge is not 'the law' but merely another decider. In no meaningful sense can it be said that the judge's decision is more representative of the law than is the jury's."

tion: "Should the defendant be liable to the plaintiff?" —or, in a criminal matter: "Has the defendant done something for which he should be punished?"

> "We wouldn't turn it over to a jury, the determining of whether the father or the mother or whether the grandmother or a sister-in-law got the child, according to the absolute whim or caprice, or, as you put it, the discretion of the jury. We wouldn't turn over to the whim of a jury the determination of whether a fox terrier belonged to the husband or the wife in a separation. We wouldn't let a jury determine that with absolute discretion. Any issue in the whole legal system that you can think of, rights, property rights, personal rights, are guided by precedents, by standards, and to leave to a jury the absolute discretion to determine whether a person lives or dies, without any guidance, or any compass or standard, principles or anything else, is foreign to the whole basic tradition of the Anglo-Saxon common law. That is the hurdle you have to face and that the Court has to meet in passing on this question." [47]

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[47] We quote this passage because it summarizes better than anything written on the subject, and better than anything we could say, the nature and the vice of standardless discretion in capital sentencing by a jury. The passage is a transcription of a statement by Chief Justice Traynor during a colloquy with the Assistant Attorney General of California in the course of the argument in *In re Anderson*, —— Cal.2d ——, 447 P.2d 117, 73 Cal. Rptr. 21 (1968), a case discussed at pp. 45-56 *infra*. See Transcript of Proceedings in the Supreme Court of California, *In re Anderson*, Crim. No. 11,572, March 28, 1968, pp. 107-108. However, because questions asked from the bench may convey a misleading impression of a judge's views, and because we would not wish to run the slightest risk of misrepresenting those of Chief Justice Traynor —even while using his words exclusively for the purpose of expressing our own thoughts—we feel obliged to set forth here two subsequent, related passages in the colloquy:

> "CHIEF JUSTICE TRAYNOR: I wonder if you were making this argument, Mr. Harris. I don't want to put words into

(8) There is no review of the jury's decision, and no judicial safeguard of any sort against invidious discriminations and other abuses. It is therefore not sur-

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your mouth. You look at this problem of standards right in the face and it's awfully easy to talk about ships without rudders or compass, boats without oars and so forth, and about assigning a fox terrier to one person or another without standards, but in this area you just can't find workable standards. Any kind of formula that you put up would simply be magic words, at best. We haven't heard of any precise standards that wouldn't be like mouthing formulas to the jury that it should take into consideration such and such factors and so forth. You can't get anything as precise as a rudder or an oar and so forth. That being the case, the question is whether you are going to have death or not. The State could say that every killing or certain killings, just automatically brought on the death penalty. The present system is a dispensation that the State has made. It is futile to think of standards. I don't know whether you make that argument or not.

. . . . .

"CHIEF JUSTICE TRAYNOR: Let me see if I can restate your argument about discretion, that there are many instances, as you pointed out, where matters are left to the discretion of the trial judge, and that is because the appellate courts, in their wisdom and experience, don't know what precise standards should be set down, because they are not—they haven't had enough experience, haven't had enough cases to lead them, haven't had enough specific items. So when the appellate court doesn't know the answer, it turns the matter over to the discretion of the trial judge, just as in many instances when we don't know the answer to a real tough question, we turn it over to a jury.

"Now, here is the toughest question of all that human beings have to face, as to whether a man should die or not. A man, say, who has thrown gasoline into a tavern and caused, say, seven or eight people to be burned; a man who rapes a girl and savagely cuts her up; who does all of the other heinous things that some of these people have been convicted of.

"Now, the question is this: Should that person die or not? Where are you going to get the guidance that is going to tell you whether a person should die or not?

"Maybe the answer is that because you have no answer, a civilized society wouldn't have the death penalty. But you might retaliate to that, that is really a question for the legislature, but on this question of standards it is impossible to

prising that the performance of jurors in the exercise of the lawless discretion given them is not merely irregular[48] and arbitrary in particular cases,[49] but ex-

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articulate a standard. Of all the questions that could be propounded to mankind, this is one which would defy a Solomon."

(*Id.*, at pp. 113-114, 120-121.) We might add, concerning this last quoted passage, that again in our judgment it goes directly to the heart of the matter. We quite agree that common experience furnishes no easy answers relating to the standards that should govern capital sentencing. All the more reason, we have suggested, why the death-sentencing decision cannot properly be left to the unguided decisions of individual juries. (See pp. 33-34 *supra*.) We deny that it would be impossible for a legislature to provide standards governing capital sentencing, if the legislature gave the matter proper attention and had rational ultimate goals in authorizing capital punishment as the available penalty in any case. (See note 67 *infra*.) However, if the nature of the death penalty, or of a legislature's reasons for ordaining it, is such that no regular, rational, even-handed policies of general applicability can be formulated to govern its administration—with the necessary result that individuals must be condemned to die irregularly, irrationally, unevenly: in short, arbitrarily and without due process of law—then it is our view precisely that the Due Process Clause forbids a civilized society to use this sort of penalty. If a sanction's use *cannot* be made consistent with due process, the Constitution of the United States makes quite clear that the sanction, not due process, must be abandoned.

[48] See KALVEN & ZEISEL, THE AMERICAN JURY (1966) 437-449. Examining jury penalty decisions in 111 death cases, and the presiding judges' evaluations of them, Kalven and Zeisel find that jurors and judges agree on a sentence of imprisonment in 76 cases, agree on death in 14, and disagree in 21. Significantly, therefore, where death is the outcome, there is more often disagreement than agreement. Patterns in jury sentencing emerge, in the sense that death-sentence cases are frequently characterized by the same sorts of aggravating circumstances. But these same factors appear in many cases where the death sentence is not imposed. "Many of the murder cases in which the judge and jury disagree on the death penalty appear no less heinous than those in which they agree." *Id.*, at 439. "The leniency categories have a plausible ring. But the brute fact is that each time one of the factors listed was persuasive to one of the deciders, it was unpersuasive to the other. Either the judge or the jury was willing, despite the presence of the leniency-disposing factor, to have the defendant executed." *Id.*, at 444.

[49] See pp. 11-13 *supra*.

hibits grossly unconstitutional discriminations[50] which the courts have been unable to control or correct. We put aside, for present purpose, the question whether a state is federally obligated to provide at least some minimal form of judicial review of a jury's determinations;[51] or whether, if its highest court freely reviews jury-fixed sentences in non-capital cases (as does Arkansas'), it may deny all power of review in capital cases alone.[52] The point we make here is that a total absence of standards to govern the jury's decision-making function—a defect that would defeat any meaningful judicial review which is allowed—is the more baneful, if possible, where there is no judicial review. The jury makes the one and only judicial decision that a capital defendant is allowed on the question whether he lives or dies; and makes that decision entirely arbitrarily.

B. *The Grant of Lawless Power in Capital Sentencing is Unconstitutional.*

We submit that the practice just described violates the rule of law basic to the Due Process Clause. The same submission was recently made to the Supreme Court of California, which rejected it by a vote of four Justices to three. *In re Anderson*, —— Cal.2d ——, 447 P.2d 117, 73 Cal. Rptr. 21 (1968). Justice Tobriner, joined by Chief Justice Traynor and Justice Peters, dissented in an opinion that states our position with incomparable lucidity. It was the view of the dissenters that the California statutes granting unfettered discretion to juries in capital sentencing

> "violate the Fourteenth Amendment of the Constitution of the United States because they provide no

[50] See pp. 13-20 *supra*.

[51] Cf. *Thompson* v. *City of Louisville*, 362 U.S. 199 (1960).

[52] Cf. *Baxstrom* v. *Herrold*, 383 U.S. 107 (1966).

> standards or tests whatsoever to enable judge or jury to decide why one convicted capital defendant should die and another should live. The California penalty trial leaves this vital decision to the unguided whim and caprice of the trier of fact; this irrational process, the antithesis of due process, has no place in the constitutional structure of American law." (Tobriner, J., joined by Traynor, C.J., and Peters, J., concurring and dissenting in *In re Anderson, supra*, 73 Cal. Rptr. at 36.)[23]

We commend the reasoning of the *Anderson* dissenting opinion to this Court. After examining the nature of the power which standardless capital-sentencing legislation confers upon the jury and concluding that it requires the jury *"to perform a sui generis function which subjects the convicted capital defendant to a power of arbitrary decision"* (*Anderson Dissent*, p. 40 (original emphasis)), the opinion states *the constitutional premise* against which such a power must be judged:

> "The constitutional imperative that laws infringing upon life and liberty be framed in terms of reasonably ascertainable standards is central to our administration of criminal justice." (*Anderson Dissent*, p. 42.)

Surely, this proposition is beyond dispute. For whatever else "due process of law" may encompass, it has always been thought to impose some demand of fundamental procedural regularity in decision making, some insistence upon the rule of law, some adherence to the principle established by Magna Carta that the life and liberty of the subject

[23] The dissenting opinion is at 73 Cal. Rptr. 36-59. We shall hereafter cite it as *Anderson Dissent*, p. , referring to the pages in 73 Cal. Rptr.

should not be taken but by the law of the land. This Court has long condemned the sort of vagueness in criminal statutes that "licenses the jury to create its own standard in each case." *Herndon* v. *Lowry*, 301 U.S. 242, 263 (1937). See, e.g., *Smith* v. *Cahoon*, 283 U.S. 553 (1931); *Cline* v. *Frink Dairy Co.*, 274 U.S. 445 (1927); *Winters* v. *New York*, 333 U.S. 507 (1948). Statutes which authorize *ad hoc* adjudications unconstrained by legal principles of general application thereby confer a "naked and arbitrary power" (*Yick Wo* v. *Hopkins*, 118 U.S. 356, 366 (1886)), which is at war with Due Process. The vice of such statutes is not alone their failure to give fair warning of prohibited conduct, but the breadth of room they leave for jury arbitrariness and the influence of impermissible considerations. *N.A.A.C.P.* v. *Button*, 371 U.S. 415, 432-433 (1963); *Freedman* v. *Maryland*, 380 U.S. 51, 56 (1965); Lewis, *The Sit-In Cases: Great Expectations*, 1963 Supreme Court Review 101, 119; Note, 109 U. Pa. L. Rev. 67, 80 (1960), including racial considerations, see *Louisiana* v. *United States*, 380 U.S. 145 (1965); *Dombrowski* v. *Pfister*, 380 U.S. 479 (1965); *Cox* v. *Louisiana*, 379 U.S. 536 (1965), and every other insidious urging of caprice or prejudice.

The *Jackson* dissent points out that this basic principle of legality, of the rule of law, is no less applicable to a court's sentencing function than to its guilt-determining function. It notes this Court's recent explicit recognition in *Witherspoon* v. *Illinois*, 391 U.S. 510, 521 n. 20 (1968), that while sentencing choice, and, in particular, the choice of life or death, may be

> "different in kind from a finding that the defendant committed a specified criminal offense, . . . this does not mean that basic requirements of procedural fair[illegible] . . . [illegible] . . . the determinations involved in this case differ in some respects from the

traditional assessment of whether the defendant engaged in a proscribed course of conduct."

Witherspoon, say the Anderson dissenters:

"therefore squarely stands for the proposition that the requirements of the Fourteenth Amendment—those that go to the very fairness and integrity of the penalty-determining process—apply to the procedure pursuant to which the state, be it by judge or jury, takes the life of a capital offender." (*Anderson Dissent*, p. 40.)

And other recent decisions of the Court point ineluctably to the same conclusion: See cases cited at p. 27 *supra*.

The question, then, is whether an unlimited grant of arbitrary power to make the life or death sentencing choice falls afoul of the Fourteenth Amendment's requirements that "go to the very fairness and integrity of the penalty-determining process." The *Anderson* dissenters conclude, and we here submit, that it does, for several reasons.

First, the totally undefined issue that is presented for the jury's decision makes it impossible for the defendant, whose life is at stake, advisedly and intelligently to prepare and present his defense on the sentencing question. We shall see in Part II of this brief, pp. 66-78 *infra*, that the single verdict trial procedure in capital cases immeasurably exacerbates the unfair litigation posture in which the defendant is put, by requiring him to fashion his case in a manner that sets at loggerheads his interests in a fair trial of the guilt question and a sound penalty determination. But, even without this additional handicap, the capital defendant who confronts a jury armed with unconfined and unguided power to sentence him to life or death is denied the least semblance of a fair trial on the matter of penalty. This Court has long recognized the

"principle of procedural due process . . . that notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge, if desired, are among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal." *Cole* v. *Arkansas*, 333 U.S. 196, 201 (1948). *See In re Gault*, 387 U.S. 1, 33-34 (1967). Even in non-criminal matters, the Court has found a Due Process right to adequate notice of the issues posed for adjudication in a proceeding affecting individual interests. E.g., *Holden* v. *Hardy*, 169 U.S. 366, 389 (1898); *Morgan* v. *United States*, 304 U.S. 1 (1938); *Gonzales* v. *United States*, 348 U.S. 407 (1955). *A fortiori*, such notice and an "opportunity to be heard" are required in the sentencing phase of a criminal case, *Specht* v. *Patterson*, 386 U.S. 605, 610 (1967), particularly where the jury is "empowered . . . to answer 'yes' or 'no' to the question whether this defendant [is] . . . fit to live," *Witherspoon* v. *Illinois*, 391 U.S. 510, 521 n. 20 (1968). But without rules of decision "sufficiently definite to guide the lawyer in contesting their applicability to his client . . . , the right to a hearing would be of little value, because there would be no adequate standards toward which argument and evidence could be directed." Note, 62 HARV. L. REV. 77, 78 (1948).[10]

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[10] The *Anderson Dissent*, p. 44, n. 9 quotes the following passage from this Harvard Note, which identifies the two due process concerns that are at the core of the present case:

> "'[D]ue process requires the adjudication of an individual's rights and duties to be governed by rules of sufficient objectivity to guard against an arbitrary or *ad hominem* result. It follows that such rules, when embodied in a statute, must be definite enough to enable the judge to make rulings of law and charges to the jury which are so closely referable to the statute as to assure consistency of application.
>
> "'Due process requires, in addition, that the rules be sufficiently definite to guide the lawyer in contesting their applicability to his client. Without this latter requirement, the right to a hearing would be of little value, because there would

It would be fair to describe the defendant's situation in a capital trial as a deadly guessing game. He cannot know what facts or positions will save him or cost him his life.[55] The legislature has not told him, or told the jury, when capital punishment is to be imposed or why it is to be imposed; and the jurors are free to take their own views. Views on capital punishment being what they are in our society, and the justifications for the death penalty being rather obscure matters of personal taste in the absence of some legislative specification, the jurors' attitudes will range wildly. A defense of consent which may not convince the jury to acquit the defendant may nevertheless lead it to the conclusion that—because the prosecutrix was less than firm in her resistance—the defendant should not be executed. Or the jury may think the degree of resistance by the prosecutrix irrelevant. Particularly where the defendant is Negro and the prosecutrix white, the defense of consent may cause the jury to execute the defendant for the unpardonable offense of adding slander to rape. Given its grisly risks, how is counsel to know what he stands to gain by making the defense?

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be no adequate standards toward which arguments and evidence could be directed. Both of these requirements would seem to be satisfied by the same degree of definiteness: a statute which is sufficiently definite to guide the judge should also be sufficiently definite to guide the lawyer in litigation, because there the function of each is the same—to test application of rules to particular situations." (Note, Due Process Requirements of Definiteness in Statutes (1948) 62 Harv. L. Rev. 77-78.)"

[55] "We must assume that in establishing the alternative punishments of death and life imprisonment rather than setting down one mandatory punishment, the Legislature concluded that not all capital offenders should be punished by the extreme penalty. . . . Yet the current administration of the death penalty, by failing to provide criteria sufficiently ascertainable to guide courts and juries in making that distinction, prevents a convicted capital defendant from knowing how to show that he falls within the class of capital offenders for whom the law contemplates the lesser penalty of life imprisonment." *Anderson Dissent*, p. 44.

If the defendant was under the influence of alcohol or drugs, the jury may take the view that that is a mitigating incident—or an aggravating one. Five jurors may have sympathy for a defendant who displays a severe mental or emotional disorder not amounting to legal insanity; while seven, who would reserve the death penalty for just such perverted savages, vote to kill him for his disorder. See *People* v. *Hines*, quoted at pp. 40-41, *supra*. The result is not a litigation in any ordinary sense but a flailing contest or a gambling escapade in which the wages of a misplaced guess are death. This is simply not a Due Process trial. See *Anderson Dissent*, pp. 43-44.

Second, "the complete absence of standards in the administration of the death penalty deprives the convicted capital defendant of any way to protect himself against an arbitrary imposition of the death penalty. Since no limitations bound the exercise of the discretion of the trier of fact, the defendant can neither challenge the evidence introduced . . . on the ground of insufficiency nor seek review on the ground of erroneous application of the death penalty to him." *Anderson Dissent*, p. 44. Standardless death sentencing thus effectively strips the convicted capital defendant of all of the safeguards of the Constitution in connection with the life-or-death penalty decision. Jurors may inflict death upon him for reasons or by processes forbidden by the clearest constitutional commands, and yet get away with it. The inability of the district and circuit courts below to come to grips with petitioner Maxwell's contention of racial discrimination is a striking example of how constitutional protections founder in the sea of limitless discretion that envelops and conceals the jury's decision-making process. The district court avoided Maxwell's compelling statistical showing of racially discriminatory sentencing patterns on the part of Arkansas juries by assuming that the factors which might be affecting the juror-

in their selection of the men sentenced to die were so subtle and complex that statistics could not take account of them all. (See A. 39-40.) Thus, although the court itself found as a fact that Negroes convicted of the rape of white victims were disproportionately frequently given death sentences, and although it was uncontested that no non-racial factor of which analysis was possible on the basis of an exhaustive empirical study could explain the racial death-sentencing differential, the court was able to imagine factors that must have escaped identification or measurement and that could account for the differential.[*] Perhaps. Such is the range of freedom in the jurors' sentencing decision that almost any speculation is possible.

The court of appeals took a somewhat more hard-headed view of the evidence and did not really deny that petitioner had proved a state-wide practice of racial discrimination. It rejected his Equal Protection contention principally on the ground that the particular jury which sentenced Maxwell to die had not been shown to have a discriminatory motivation. (A. 59-64.) Doubtless this last conclusion is factually correct. Since, under Arkansas law, Maxwell's jurors could have had almost anything in mind—or nothing in mind—to support their death verdict, it is quite impossible to say.

It has been pointed out that one of the purposes of the Due Process requirement of definiteness in penal legislation is to delimit "to what extent the administration of public order can assume a form which, first, makes possible the deprivation sub silentio of the rights of particular citizens, and, second, makes virtually ineffectious the federal judicial machinery established for the vindication of those rights." Note, 109 U. Pa. L. Rev. 69, 81 (1960). The

[*] Viz., the "issue of consent" discussed at A. 40.

function of courts to protect against the deprivation of specific constitutional guarantees—such as the guarantee against racial discrimination—"requires at the least a continued surveillance to assure the regularity of legislated and administered modes of applying public compulsion to all particular men. It requires, as a corollary, the maintenance of a state of institutions in which that surveillance is kept effective." *Id.*, at 89. If ever a form of penal enactment flouted these requirements, and thereby established a regime of administration in which nothing was certain but that denials of federal rights would go undetected and uncorrectible, standardless death sentencing legislation is that form.

Third, the arbitrary power which this legislation confers to differentiate among convicted rape defendants by sentencing some to life and some to death for any or no reason violates a constitutional concern in regard to which "the equal protection and due process clauses of the Fourteenth Amendment overlap." *Anderson Dissent*, p. 47. This is the concern for even-handed treatment which allows "no invidious discriminations between persons and different groups of persons," *Griffin* v. *Illinois*, 351 U.S. 12, 17 (1956), and ordains that all shall "stand on an equality before the bar of justice in every American court." *Ibid.*, quoting *Chambers* v. *Florida*, 309 U.S. 227, 241 (1940). A corollary of these propositions is that differences in the treatment of individuals by the courts must have some rational basis; that is, there cannot be differentiations without differences, nor differentiations along lines of difference that have no rational relation to the purpose for differentiating. E.g., *Rinaldi* v. *Yeager*, 384 U.S. 305 (1966); *Barstrom* v. *Herrold*, 383 U.S. 107 (1966). Particularly where "legislation . . . involves one of the basic civil rights of man . . . , strict scrutiny of the classification which a State makes . . . is essential, lest unwittingly or otherwise,

invidious discriminations are made against groups or types of individuals in violation of the constitutional guaranty of just and equal laws." *Skinner* v. *Oklahoma*, 316 U.S. 535, 541 (1942).

The *Skinner* case held that a state could not, by legislative classification, draw the line of sexual sterilization between thieves and embezzlers. "When the law lays an unequal hand on those who have committed intrinsically the same quality of offense and sterilizes one and not the other, it has made . . . [a constitutionally forbidden invidious discrimination]." *Id.*, at 541. We take it that, under *Skinner*, a state could not constitutionally draw the line of death between thieves and embezzlers either; nor could it permit its juries to draw so irrational a line in the exercise of a general death-sentencing discretion. If this is so, it is difficult to conceive how Arkansas may give its juries *arbitrary* power—which necessarily includes the competence to draw lines as unsubstantial as the line between thieves and embezzlers, or more unsubstantial still—without falling afoul of the same constitutional interdiction.

This is not to say, of course, that a state may not constitutionally provide for differential sentencing of offenders convicted of the identical offense. There is no inconsistency whatever between the principle of equality and a procedure for individualizing sentencing, even death sentencing. "Equality and individualization go together; they complement each other. They are of one piece."[17] This is so because any system of individualization that efficiently serves the penal interests of the state must necessarily be based upon some rational scheme for differentiating among offenders; and if the bases of differentiation are rational,

[17] Rubin, *Disparity and Equality of Sentences—A Constitutional Challenge*, 40 F.R.D. 55, 69 (1966).

the Fourteenth Amendment is satisfied. The trouble with standardless death-sentencing legislation is that it authorizes *irrational* differentiation.[55] By

> "providing no classificatory criteria whatsoever, [it] permits the trier of fact *arbitrarily* to determine whether [a] particular convicted capital defendant should suffer death rather than life imprisonment. Such absence of classification renders the current procedure insufficient to satisfy even the *minimum* requirement of the equal protection clause that differential treatment of persons prima facie similarly situated must bear some rational relation to a discernible legislative purpose. In failing to provide any rational basis upon which to justify an imposition of the death penalty on those particular capital defendants sentenced to death rather than life imprisonment, [standardless death-sentencing statutes make an invidious discrimination]. . . . 'It is clearly unconstitutional to enable a public official [by alone an ad hoc group of 12 individuals][56] to * * * engage in invidious discrimination among persons or groups * * * by use of a statute providing a system of broad discretionary * * * power.' (Cox v. State of Louisiana, . . . 379 U.S. 536, 557

[55] "Recognition of the problem created by disparate sentences does not, however, compel the conclusion that all offenders who commit the same offense ought to receive the same sentence—the theory of 'uniform sentencing.' There may be differentiating personal and social factors which require 'individualization' of different sentences for offenders who have engaged in the same anti-social conduct. But if a system of individualization is to satisfy objections against disparity, the disparity inherent in individualization must result from the articulated application of uniform criteria designed to effectuate agreed-upon goals." Note, 69 YALE L.J. 1453, 1459 (1960).

[56] This bracketed insertion is by the author of the *Anderson* dissent. The others in the passage are ours. Emphasis throughout is found in the original.

[1965] . . . ; Yick Wo v. Hopkins, . . . 118 U.S. 356, 366-368 [1886] . . . .) Thus, the trier of fact's absolute power to impose the death penalty on a convicted capital defendant violates the basic interdictment of the equal protection clause that no person shall hold 'a naked and arbitrary power' to make invidious discriminations against another. (Yick Wo v. Hopkins, supra, 118 U.S. at pp. 366, 368, . . .)" (*Anderson Dissent*, pp. 49-50.)

Fourth, and most fundamentally, the process of the standardless death sentencing decision subjects the defendant to an exercise of legally unregulated power which is antithetical to the rule of law expressed by Due Process.

"The epitome of the vice of absence of procedural safeguards inherent in vague and standardless statutes thus permeates the administration of the death penalty: the defendant sentenced to death cannot even show that an ad hoc group of 12 jurors . . . exercising absolute power over his life abused this discretion. [The statutes giving the jury such power] . . . thus deny due process of law because they provide no standards by which an abuse of discretion by the trier of fact can be curbed or even subjected to review. The power of the trier of fact to decree the death sentence is as broad and arbitrary as it is absolute and untouchable." (*Anderson Dissent*, p. 44.)

In this aspect, what is constitutionally wrong with standardless death sentencing is that it collides violently with a principle so basic that it hardly ever is or needs to be explicitly asserted, because our entire system of law assumes it. It is the principle of legality. Standardless death sentencing is its opposite: arbitrariness. In order to protect against the regime of arbitrariness, the fabric of

our legal structure—laws, Constitution, and courts—has been established. The function of the structure, to maintain the rule of law, has as its one most essential objective to deny arbitrariness entrance to the system. For "the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself." *Yick Wo* v. *Hopkins*, 118 U.S. 356, 370 (1886).

Under the principle of legality, it could scarcely be contended that an Arkansas statute would be valid which provided: "Whoever is found condemnable in the discretion of the jury shall be guilty of an offense."[60] Yet we submit

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[60] See PACKER, THE LIMITS OF THE CRIMINAL SANCTION (1968) 92-94:

> "Let us suppose for a moment that a legislature, contemplating the momentous problem of drafting a new criminal code, decided to solve its problem by a single grand enactment: whoever does anything bad shall be punished as justice may require. When a court is called upon to decide whether John Jones, who hit his neighbor over the head with a hammer during the course of an argument, has violated the statute, is the court making law or is it applying law? The question is absurd, of course. In a sense, the court is doing both. But the significant question, which is concealed by categorical treatment of law-making and law-application, is: how great a degree of freedom is the court allocated in deciding whether to treat John Jones's conduct as criminal? The extremity of the example makes the issue clear. . . . It hardly needs argument that the hypothetical criminal enactment just proposed —whoever does anything bad shall be punished as justice may require—does violence to the principle of legality. As the example shows, it is not enough that the law formally being applied is law in existence at the time the conduct complained of occurred. Devices are needed to ensure that the amount of discretion entrusted to those who enforce the law does not exceed tolerable limits. But the working out of the devices and the decision about what limits are tolerable are functions that fall to the courts. It is, of course, no accident that they fall to the courts; neither, however, is it the result of any

so, one must begin by recognizing what this Court has several times said, that much evidence which is not relevant to the issue of guilt of the charge for which the capital accused is on trial—evidence which, indeed, is prejudicial and inadmissible on the issue of guilt—is highly relevant to a non-arbitrary decision on the question of punishment. "[M]odern concepts individualizing punishment have made it all the more necessary that a sentencing judge not be denied an opportunity to obtain pertinent information by a requirement of rigid adherence to restrictive rules of evidence properly applicable to the trial." *Williams* v. *New York*, 337 U.S. 241, 247 (1949); see also *Williams* v. *Oklahoma*, 358 U.S. 576, 585 (1959); *Witherspoon* v. *Illinois*, 391 U.S. 510, 521 n. 20 (1968). *A fortiori*, a jury engaged in the task of determining whether a defendant shall live or die needs much information that cannot and should not be put before it within the confines of traditional and proper limitations on the proof allowable as going to guilt or innocence. It is fair to say that the overwhelming weight of considered contemporary judgment concurs in the conclusion that, whether discretionary death sentencing be done by a judge or jury, it is the imperative condition of rational sentencing choice that the sentencer consider more information about the individual defendant than is likely or permissibly forthcoming on trial of the guilt issue. E.g., HOUSE OF COMMONS SELECT COMMITTEE ON CAPITAL PUNISHMENT, REPORT (H.M.S.O. 1930), para. 177; ROYAL COMMISSION ON CAPITAL PUNISHMENT, 1949-1953, REPORT (H.M.S.O. 1953) (Cmd. No. 8932), 6, 12-13, 195, 201, 207; AMERICAN LAW INSTITUTE, MODEL PENAL CODE, Tent. Draft. No. 9 (May 8, 1959), Comment to §201.6 at 74-76; NEW YORK STATE TEMPORARY COMMISSION ON REVISION OF THE PENAL LAW AND CRIMINAL CODE, INTERIM REPORT (Leg. Doc. 1963, No. 8) (February 1, 1963), 15-16; H.L.A. Hart, *Murder and the Principles of Punishment:*

England and the United States, 52 Nw. U.L.Rev. 433, 438-439 (1957); Knowlton, *Problems of Jury Discretion in Capital Cases*, 101 U.Pa. L.Rev. 1099, 1109, 1135-1136 (1953); Handler, *Background Evidence in Murder Cases*, 51 J. Crim.L., Crim. & Pol. Sci. 317, 321-327 (1960).

The single-verdict procedure therefore confronted petitioner, on trial for his life, with a gruesome Hobson's choice:

> Petitioner had a crucial interest—amounting, indeed, to an independent federal constitutional right, see *Skinner* v. *Oklahoma*, 316 U.S. 535 (1942)—that his sentence be rationally determined. The Constitution guaranteed him, also, certain procedural rights in this sentencing process: *inter alia*, "an opportunity to be heard . . . and to offer evidence of his own." *Specht* v. *Patterson*, 386 U.S. 605, 610 (1967); *Mempa* v. *Rhay*, 389 U.S. 128 (1967). As the basis for a rational sentencing determination, he would want to present to the sentencing jurors evidence of his history, his character, his motivation, and the events leading up to his commission of the crime of which he was guilty (if he was guilty). The common-law gave him a right of allocution which is an effective vehicle for this purpose, as well as for a personal appeal to the jurors, where capital sentencing is discretionary. This Court has already recognized that allocution may in some circumstances rise to the dignity of a due process command.[75]

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[75] *Hill* v. *United States*, 368 U.S. 424, 428-429 (1962); see *Andrews* v. *United States*, 373 U.S. 334, 336-337 (1963). Acting on these opinions, several circuit courts have found allocution a constitutional right. *Green* v. *United States*, 313 F.2d 6 (1st Cir. 1963), *cert. denied* 372 U.S. 951 (1963); *United States* v. *Johnson*, 315 F.2d 714 (2d Cir. 1963), *cert. denied*, 375 U.S. 971 (1964); *Behrens* v. *United States*, 312 F.2d 223 (7th Cir. 1962), *aff'd*, 375 U.S. 162 (1963).

The *Hill* case holds that, absent "aggravating" circumstances (368 U.S. at 429), failure of a sentencing judge to invite the

But to exercise his right of allocution before verdict on the guilt issue, petitioner was required to forego his constitutional privilege against self-incrimination. *Malloy* v. *Hogan*, 378 U.S. 1 (1964); *Griffin* v. *California*, 380 U.S. 609 (1965). He was required to take the stand and be subjected to cross-examination that could incriminate him.[76]

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defendant to exercise his right of allocution does not violate due process. But *Hill* was not a capital case, nor a case in which counsel was denied the right to present pertinent information to the sentencer, nor "a case where the defendant was affirmatively denied an opportunity to speak during the hearing at which his sentence was imposed . . . . [nor where the sentencer] was either misinformed or uninformed as to any relevant circumstances . . . [nor where it was even claimed] that the defendant would have had anything at all to say if he had been formally invited to speak." *Ibid.* In an Arkansas capital case, the following "aggravating circumstances" are presented: (A) the circumstances that the right of allocution has had unique historical significance in capital cases, see *Couch* v. *United States*, 235 F.2d 519, 521 (D.C. Cir. 1956) (opinion of Judge Fahy); *Coleman* v. *United States*, 334 F.2d 558, 566 (D.C. Cir. 1964) (opinion of Judges Burger and McGowan); (B) the circumstance that in capital cases matters which may affect the sensitive discretion of the jury in its life-death choice are traditionally viewed with a stricter eye to possibilities of prejudice than are other matters in the criminal process, see *People* v. *Hines*, 61 Cal. 2d 164, 390 P.2d 398, 37 Cal. Rptr. 622 (1964); (C) the circumstance that Arkansas' single verdict procedure "affirmatively" denies a defendant his opportunity to address the jury on sentence, within the meaning of *Hill, supra;* (D) the circumstance that, for the reasons set out above in text, a jury making a capital sentencing choice on no other information than the trial of the guilt issue allows is invariably "either misinformed or uninformed" within the meaning of *Hill;* (E) the circumstance that, under the Arkansas procedure, not only is the defendant denied the right to make a personal statement without giving up his constitutional privilege against self-incrimination, but he is similarly denied the right to have his counsel supply evidence on the sentencing issue without incurring the risks of prejudice on the guilt issue, see the *Johnson* and *Behrens* cases cited, *supra;* also *Gadsden* v. *United States*, 223 F.2d 627 (D.C. Cir. 1955); *Jenkins* v. *United States*, 249 F.2d 105 (D.C. Cir. 1957).

[76] Even apart from cross-examination, allocution before verdict of guilt destroys the privilege, for much of the value of the defendant's personal statement to his sentencer derives from its spon-

He declined to surrender the Privilege, and did not address the jury. (A. 41.) The jurors who sentenced him to die therefore had neither heard his case for mercy, nor even the sound of his voice.

United States v. *Jackson*, 390 U.S. 570 (1968), holds that the exercise of the Fifth Amendment privilege in criminal trials may not be penalized or needlessly burdened. Simultaneous submission to the jury of the guilt and death penalty issues results in just such a needless burden. The burden is the obvious and onerous one that the defendant must go to his death like a dumb animal, forbidden to plead his case and incapable even of impressing the human quality of his voice on his sentencing jury. It is a needless burden because the State has ample means to avoid it by, for example, a bifurcated jury trial, judge sentencing, or the elimination of the death penalty. Consistently with *Jackson*, *Simmons* v. *United States*, 390 U.S. 377, 394 (1968), points the way to condemnation of the "undeniable tension" between constitutional rights presented here. The question in *Simmons* was whether a defendant might be obliged either to give up what he believed to be a valid Fourth Amendment claim or "in legal effect, to waive his Fifth Amendment privilege against self-incrimination"; and this Court there held it "intolerable that one constitutional right should have to be surrendered in order to assert another." *Ibid.*

But the single-verdict practice which petitioner challenges presents grave problems in addition to this conflict between the right of allocution and the privilege. If the defendant

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taneity, see *Green* v. *United States*, 365 U.S. 301, 304 (1961) (opinion of Mr. Justice Frankfurter). This same spontaneity—unguided by the questions of counsel—leaves the defendant impermissibly unprotected as he appears before a jury which has not yet decided on his guilt. *Cf. Ferguson* v. *Georgia*, 365 U.S. 570 (1961).

seeks to present to the jury evidence of his background and character, apart from his own statement, the prosecution may counter with evidence of the defendant's bad character, including evidence of unrelated crimes. The prohibition which ordinarily keeps this sort of evidence from the trial jury sitting to determine the issue of guilt is "one of the most fundamental notions known to our law," *United States* v. *Beno*, 324 F.2d 582, (2d Cir. 1963), arising "out of the fundamental demand for justice and fairness which lies at the basis of our jurisprudence," *Lovely* v. *United States*, 169 F.2d 386, 389 (4th Cir. 1948); see *Marshall* v. *United States*, 360 U.S. 310 (1959). Allowing the trial jury access to unfavorable background information, however pertinent to the issue of punishment, and however clearly limited by jury instructions to that use, may itself amount to a denial of due process of law. Compare *United States ex rel. Scoleri* v. *Banmiller*, 310 F.2d 720 (3d Cir. 1962), *cert. denied*, 374 U.S. 828 (1963), with *United States ex rel. Rucker* v. *Myers*, 311 F.2d 311 (3d Cir. 1962), *cert. denied*, 374 U.S. 844 (1963). In any event, the possibility that the background information will be strongly prejudicial forces a defendant to a "choice between a method which threatens the fairness of the trail of guilt or innocence and one which detracts from the rationality of the determination of the sentence." AMERICAN LAW INSTITUTE, MODEL PENAL CODE, *supra* at 64.

In this aspect, the practice of simultaneous submission of guilt and sentence to a jury is much akin to New York's former practice of simultaneously submitting to a jury the two issues of the voluntary nature of a confession and the guilt of the accused. The New York practice was, of course, struck down in *Jackson* v. *Denno*, 378 U.S. 368 (1964), where the Court recognized that joint jury trial of the two issues prevented either from being "fairly and reliably

determined." 378 U.S. at 389; see *id.* at 386-391. One fault of the practice was that:

> ". . . an accused may well be deterred from testifying on the voluntariness issue when the jury is present because of his vulnerability to impeachment by proof of prior convictions and broad cross-examination. . . . Where this occurs the determination of voluntariness is made upon less than all of the relevant evidence. (378 U.S. at 389 n. 16).[77]

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[77] To the extent that petitioner's argument on this branch of his case draws sustenance from the radiations of the rule of *Jackson* v. *Denno*, text, *supra*, his argument is not weakened by *Spencer* v. *Texas*, 385 U.S. 554 (1967), cited by the court of appeals. The *Spencer* decision dealt with the Texas procedure for determining the punishment decreed under its recidivist statutes, pursuant to which a jury trying a criminal defendant was informed by a reading of the indictment that the defendant had been convicted of prior crimes, and evidence was introduced in support of these allegations during the course of trial. The procedure was attacked on the ground that it unduly prejudiced the defendant on the issue of guilt, in violation of the Due Process Clause. In rejecting this attack, the Court held, *inter alia*, that *Jackson* v. *Denno* did not require a two-stage jury trial for invocation of a state's habitual offender statute and that "the emphasis [in *Jackson*] was on protection of a specific constitutional right and the *Jackson* procedure was designed as a specific remedy to ensure that an involuntary confession was not in fact relied upon by the jury," 385 U.S., at 565.

But no more "specific constitutional right" can be imagined than that which prohibits the state's taking of petitioner's life pursuant to a sentencing process which is irrational because sentencing choice is made without information essential to the choice, *Skinner* v. *Oklahoma, supra; Specht* v. *Patterson, supra.* And though the Court in *Spencer* read *Jackson* as not broadly requiring a two-stage jury proceeding whenever evidence of prior crimes which might possibly prejudice the jury's determination of the guilt issue is presented at the trial (because of the justifications generally accepted for permitting such evidence—see 385 U.S., at 560-61), Jackson's holding that "a general jury verdict [is] not a reliable vehicle for determining the issue of voluntariness [of a confession] because jurors might have difficulty in separating the issue of voluntariness from that of guilt or innocence," 385 U.S. at 565, is unimpaired. See *Burgett* v. *Texas*, 389 U.S. 109 (1967):

And see *Bruton* v. *United States*, 391 U.S. 123 (1968).

It is in precisely the same manner that single-verdict capital sentencing tends either to make trials of guilt unfair—by forcing the defense to present evidence potentially helpful on the punishment issue and prejudicial on the issue of guilt—or to produce the unfair result that men are sentenced to death "upon less than all of the relevant evidence" if the defense declines to take that risk.[78]

Simmons v. *United States*, text, *supra*. That, by analogy, applies with equal, if not greater force to the jury's determination of the issues of guilt and sentence in a capital case. The "specific remedy" for reliably determining these issues enjoined on the courts by *Jackson*, reinforced by *Sims* v. *Georgia*, 385 U.S. 538 (1967), and endorsed by *Spencer* is that of separate consideration of the issues.

Moreover, there are crucial differences between the situation presented here and that presented by the practice challenged in *Spencer*. First, the sole claim urged by the petitioners in *Spencer* was that the introduction of prior crime evidence before jury verdict on the guilt issue unduly prejudiced the defendant on that issue (385 U.S. at 559, 567) and was therefore unconstitutional per se. Petitioner's submission here differs. The effect of the single-verdict sentencing procedure which he challenges is to confront a capital defendant with the grim specter of having to sacrifice one or another of his precious constitutional rights, either allocution or self-incrimination. By whatever choice he makes, he is prejudiced on either the issue of guilt or sentence; and he must decide—with his life at stake—which kind of prejudice to invite. Cf. *Whitus* v. *Balkcom*, note 78, *infra*. Also, while in *Spencer* the juries were given limiting instructions to guide their consideration of the prior crime evidence on the guilt issue, the jury's discretion in sentencing choice under Arkansas law is not limited or regulated in any way. See pp. 24-45, *supra*. Hence there is more than "the possibility of some collateral prejudice" (385 U.S. at 564) which the Court in *Spencer* thought not of sufficient gravity to condemn the procedure there attacked.

Finally, the Arkansas procedure has been shown on this record to have resulted in a pattern of racially discriminatory death sentencing. This goes far toward satisfying the concern of the *Spencer* court over the lack of a convincing showing of prejudice.

[78] Such a " 'grisly,' hard, Hobson's choice" is itself so unfair as to violate due process. See *Whitus* v. *Balkcom*, 333 F.2d 496, 499 (5th Cir. 1964).

This latter alternative was the course of Maxwell's trial, and its result. Not only, in such a case, is the jury empowered to act arbitrarily, see pp. 24-65, *supra;* it is virtually compelled to do so for want of information upon which nonarbitrary choice can be based. In short, although the Due Process Clause guaranteed Maxwell a fair trial on the issue of punishment, *e.g., Townsend* v. *Burke,* 334 U.S. 736 (1948), as well as on the issue of guilt, *e.g., Irvin* v. *Dowd,* 366 U.S. 717 (1961), the single-verdict procedure employed in his case required him to purchase the second of these at the cost of the first. Cf. *Fay* v. *Noia,* 372 U.S. 391, 440 (1963).

As the question in *United States* v. *Jackson,* 390 U.S. 570 (1968), was whether the provision of the federal kidnaping statute reserving the infliction of the death sentence to the exclusive province of the jury "needlessly encourages" guilty pleas and jury waivers and therefore "needlessly chill[s] the exercise of basic constitutional rights," 390 U.S., at 582, 583, so the question here is whether the simultaneous trial of guilt and punishment *needlessly encourages* the waiver of the right to remain silent or *needlessly chills* the right to put in evidence relevant to rational sentencing and the right of allocution. "The question is not whether the chilling effect is 'incidental' rather than intentional; the question is whether that effect is unnecessary and therefore excessive." 390 U.S., at 582. We submit the answer to the question is clear, in light of the ready availability of alternative modes of procedure not involving the same destructive collision of the defendant's rights—such as the split-verdict procedure now in use in a number of jurisdictions[79] and uni-

[79] A man tried on a capital charge in California, Connecticut, New York, Pennsylvania and Texas receives first a hearing on innocence or guilt; then, after a finding of guilt, a separate hearing

formly recommended by modern commentators, see *Frady* v. *United States*, 348 F.2d 84, 91 n. 1 (D.C. Cir. 1965) (McGowan, J.); cf. *United States* v. *Curry*, 358 F.2d 904, 914 (2d Cir. 1965).[80]

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on the issue of punishment. CAL. PENAL CODE, §190.1 (Supp. 1966); CONN. GEN. STAT. REV. §53-10 (Supp. 1965); N.Y. PEN. LAW §§125.30, 125.35 (Cum. Supp. 1968); PA. STAT. ANN., tit. 18, §4701 (1963); TEX. CODE CRIM. PRO., Art. 37.07 (1967). See also §210.6 of the Model Penal Code, note 66, *supra*. In view of the availability of this alternative "split-verdict" mode of procedure which does not entail the deprivation of petitioner's rights, the constitutionally unfair single-verdict procedure used in petitioner's case can obviously not be defended on the ground of necessity. Petitioner, of course, does not contend that the State is constitutionally compelled to have a bifurcated trial. The bifurcated trial is only one of the alternatives available to the State which do not entail the needless burden on capital defendants' constitutional rights here complained of.

[80] Cf. *Witherspoon* v. *Illinois*, 391 U.S. 510, 520 n. 18 (1968), noting that if a defendant could establish that a jury which was representative with respect to penalty was *not* representative with respect to guilt,

> "the question would then arise whether the State's interest in submitting the penalty issue to a jury capable of imposing capital punishment may be vindicated at the expense of the defendant's interest in a completely fair determination of guilt or innocence—given the possibility of accommodating both interests by means of a bifurcated trial, using one jury to decide guilt and another to fix punishment."

CONCLUSION

Petitioner's trial jury was permitted lawless and arbitrary power to decide whether he should live or die, in violation of the rule of law that is fundamental to the Fourteenth Amendment. Arkansas' single-verdict capital trial procedure assured that this arbitrary power would be used arbitrarily, by depriving the jury of information requisite to rational sentencing choice, as a consequence of petitioner's exercise of his Fifth and Fourteenth Amendment privilege against self-incrimination. The use of these two procedures at his trial deprived petitioner of his life without due process of law. The judgment below should be reversed.

Respectfully submitted,

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APPENDIX A

Evidence and Findings Below Relating to Racial Discrimination by Arkansas Juries in the Exercise of Their Discretion to Sentence Capitally for the Crime of Rape.

A. *The Evidence of the Wolfgang Study.*

Petitioner's second federal habeas corpus petition, giving rise to the proceedings now before the Court, alleged that new evidence had become available with respect to his claim of racial discrimination in capital sentencing, previously urged at his trial, on his direct appeal, and in his initial federal habeas application. It averred, specifically, that a systematic study of Arkansas rape convictions during a twenty-year period had been:

> "conducted in the summer of 1965, as part of a study of the application of the death penalty for rape in eleven southern states. This comprehensive study required the work of 28 law students throughout the summer, the expenditure of more than $35,000 and numerous hours of consultative time by expert criminal lawyers, criminologists and statisticians. Petitioner, who is an indigent, could not have himself at any time during the prior proceedings in his cause conducted such a study." (A. 6, quoted by the court of appeals, at A. 48.)

At a pre-trial conference, the district court was advised that petitioner intended to present at an evidentiary hearing the results of this comprehensive study. Its pre-trial conference order reflected that petitioner's evidence would consist in part of "the testimony of Dr. Marvin E. Wolfgang, a criminologist and statistician on the faculty of the University of Pennsylvania, and . . . certain studies and

a report made by Professor Wolfgang," which in turn were based upon "[b]asic data . . . gathered by law student field workers from various sources and . . . recorded on individual case schedules." (A. 17-18.) Accordingly, the order provided for procedures to facilitate the establishment of "the validity and accuracy of the individual case schedules." (A. 18.)[1a]

> "It was agreed that counsel for Maxwell will make those schedules available for the inspection of counsel for Respondent not later than August 10 and will also furnish the names and addresses of the field workers who assembled the original data in Arkansas. Not later than August 15 counsel for Respondent will advise opposing counsel and the Court as to whether, to what extent, and on what grounds he questions any individual case schedule.
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> "Subject to objections on the ground of relevancy and materiality, and subject to challenges to individual case schedules, Professor Wolfgang will be permitted to testify as an expert witness and to introduce his

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[1a] The "individual case schedules" referred to are the completed forms, for each case of conviction of rape, of the printed schedule captioned "Capital Punishment Survey" admitted as Petitioner's Exhibit P-2 (Tr. 57). [Tr. — references in this Appendix are to the original transcript of the district court proceedings.] The use of this printed schedule in the process of data-gathering was explained by Dr. Wolfgang at Tr. 22-25. Instructions given the field researchers in use of the schedule are included in the record as an exhibit, Petitioner's Exhibit P-3 (Tr. 25-27, 57), but, in view of the respondent's concession that the facts gathered by the researchers were accurate, see text *infra*, no effort was made in the testimony to demonstrate the steps taken in gathering the data to assure reliability. See Tr. 25-27. Also, in light of the court's pre-trial conference order, text, immediately *infra*, the completed "individual case schedules" were not introduced in evidence.

report as a summary exhibit reflecting and illustrating his opinions. Again subject to objections or challenges to individual schedules there will be no occasion for Petitioner to introduce the schedules in evidence or prove the sources of the information reflected thereon or therein, or to call the individual field workers as witnesses." (A. 18.)

When the case came on for hearing, counsel for petitioner announced that no objections had been filed by the respondent to any of the individual case schedules, so that "all of the facts in the schedules are treated as though they are true, and Dr. Wolfgang's testimony is to be treated as though based not on schedules, but on facts which are established of record . . . As I understand it, the basic facts on which Dr. Wolfgang's testimony and his analysis are made are treated as established for the purpose of this case." (Tr. 8.) Counsel for respondent and the court agreed with this statement (Tr. 8-9), the court settling that:

> "The basic facts—that is, the age of the victim, the race, and so on, of the individual defendants, or the alleged victims—the basic evidentiary facts, as the Court understands it, stand admitted, and that Dr. Wolfgang in testifying, or anybody else who testifies about these basic figures, will not be faced with an objection as to the authenticity of his basic data." (Tr. 9.)[2a]

On this understanding, Dr. Marvin E. Wolfgang was called as a witness for petitioner. In its written opinion, the district court termed him a "well qualified sociologist

[2a] The Court of Appeals accepted this procedure without question. (A. 48.)

and criminologist on the faculty of the University of Pennsylvania" and noted that his "qualifications to testify as an expert are not questioned and are established" (257 F. Supp. at 717-718; A. 33).[3a] (Similarly, the Court of Appeals was later to find that Dr. Wolfgang "obviously is a man of scholastic achievement and of experience in his field," whose " 'qualifications as a criminologist have [concededly] never been questioned by the respondent.' " (398 F.2d at 141; A. 49.)) Dr. Wolfgang's testimony occupies some ninety pages of the transcript of the hearing (Tr. 10-99); in addition, "a written report prepared by him, together with certain other relevant documentary material, was received in evidence without objection" (257 F. Supp. at 717-718; A. 33-34). The written report referred to, Petitioner's Exhibit P-4, was received as substantive evidence (Tr. 57), and will be relied upon together with Dr. Wolfgang's testimony in the summary of evidence that follows.

The district court's opinion fairly summarizes the "background facts of the Wolfgang study":[4a]

> "In early 1965 Dr. Wolfgang was engaged by the NAACP Legal Defense and Educational Fund, Inc., to

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[3a] Interrogation of Dr. Wolfgang establishing his qualifications is at Tr. 10-14. In addition, Petitioner's Exhibit P-1, a *curriculum vitae* of Dr. Wolfgang, was received in evidence to establish his qualifications, Tr. 14-16. Dr. Wolfgang is one of the foremost criminologists in the country.

[4a] The general scope of the study, which gathered data concerning every case of conviction for rape during a 20-year period in 250 counties in eleven States, is described more fully in the affidavit of Norman C. Amaker, Esq., attached as Exhibit 2 to the petition for habeas corpus. For other descriptions, see the Memorandum and Order, dated July 18, 1966, appended to the opinion in *Moorer v. South Carolina*, 368 F.2d 458 (4th Cir. 1966); and the opinion in *Matter of Sims and Abrams*, 389 F.2d 148 (5th Cir. 1967).

make a study of rape convictions in a number of southern States, including Arkansas, to prove or disprove the thesis that in those States the death penalty for rape is disproportionately imposed upon Negro men convicted of raping white women. Dr. Wolfgang was apprised of the fact that the results of his study might well be used in litigation such as the instant case.

"As far as Arkansas is concerned, Dr. Wolfgang caused Mr. John Monroe, a qualified statistician, to select a representative sample of Arkansas counties with reference to which the study would be made. The sample drawn by Mr. Monroe, who testified at the hearing, consisted of 19 counties in the State.

"During the summer of 1965 law students interested in civil rights problems were sent into Arkansas to gather basic data with respect to all rape convictions in the sample counties for a period beginning January 1, 1945, and extending to the time of the investigation. Data obtained as to individual cases were recorded on individual case schedules. When the work was completed, the individual schedules were turned over to Dr. Wolfgang for evaluation.

"The investigation brought to light 55 rape convictions during the study period involving 34 Negro men and 21 white men. The offenses fell into three categories, namely: rapes of white women by Negro men; rapes of Negro women by Negro men; and rapes of white women by white men. No convictions of white men for raping Negro women were found." (257 F. Supp. at 718; A. 34-35. See also the opinion of the Court of Appeals, 398 F.2d at 141-142; A. 49.)

The design of the investigation was described by Dr. Wolfgang as a function of its objectives "to collect the

appropriate kind of data necessary to provide some kind of empirical study, either in support of, or in rejection of, the underlying assumption" (Tr. 17)—i.e., that there is racially differential imposition of the death penalty for rape in the States studied (Tr. 16-17)—and "to give the empirical data the appropriate kind of statistical analysis that would satisfy scientific requirements" (Tr. 17). The basic research methodology involved these several stages: (1) identification of the cases to be studied; (2) collection of data concerning the critical variables (race of defendant, race of victim, sentence imposed) in each case, and statistical analysis of the relationship between these variables; (3) collection of data concerning other variables ("control" variables) in each case, and statistical analysis of the relationship between each such variable and the critical variables (race and sentence) to determine whether the operation of the control variables could explain or account for whatever relationship might be observed between the critical variables; (4) reporting of results of the analysis. It is convenient to summarize the evidence presented to the district court under these four heads, with respect to the Arkansas study. Such a summary can only imperfectly portray the character and range of the Wolfgang study. We respectfully invite the Court's attention to the whole record of the hearing below.

1. Identification of the Cases to Be Studied.

Data were gathered concerning every case of conviction for rape during a 20-year period (January 1, 1945 to the summer of 1965) in a representative sample of Arkansas counties (Tr. 21). Two points should be noted here.

First, because the study begins with cases of *conviction for rape*, it addresses itself at the outset to the possibility

suggested by the Supreme Court of Arkansas on the direct appeal in petitioner's case, *Maxwell* v. *State*, 236 Ark. 694, 370 S.W.2d 113 (1963), that any showing that Negroes are more frequently sentenced to death for rape than whites might be accounted for by the supposition that Negroes commit rape, or are convicted of rape, more frequently than whites. What is compared in this study is the rate of capital sentencing of Negro and white defendants *all of whom* have been convicted of rape.

Second, in order to give a valid basis for generalization about the performance of Arkansas juries, *every* case of conviction for rape in a randomly selected sample of Arkansas counties was included in the study (Tr. 62-63). The county sampling procedure was employed because resources available for the field study did not permit the gathering of data in every county in the State (Tr. 21, 107-111), and because it is "unnecessary to collect every individual case, so long as the sample is presumed to be a valid representation—a valid representative one" (Tr. 21). At Dr. Wolfgang's request, a random sample (Tr. 128) of Arkansas' 75 counties was drawn by Mr. John Monroe, a "qualified statistician" (257 F. Supp. at 718; A. 34), with seventeen years experience in sampling and surveys (398 F.2d at 144; A. 53-54).[5a] Testifying below, Mr. Monroe described in detail the sampling process used (Tr. 107-141) to draw counties "in such a manner that the sample counties within each state would provide a representative sampling for that state so that inferences could be drawn for each state in the sample and for the region as a whole" (Tr. 107). Nineteen counties in the State (Tr. 28, 118; 122-123; Petitioner's Ex-

[5a] Mr. Monroe's qualifications appear at Tr. 104-106. His biography, in summary form, was admitted as Petitioner's Exhibit P-10 (Tr. 144-145).

hibit P-5, appendices C, D; Petitioner's Exhibit P-7) containing more than 47 per cent of the total population of Arkansas (Petitioner's Exhibit P-4, p. 1; Tr. 130; 398 F.2d at 144; A. 54) were drawn by a "theoretically unbiased" random method (Tr. 118). Mr. Monroe testified that "a sample is the procedure of drawing a part of a whole, and if this sample is drawn properly according to the law of chance, or with known probability, by examining a small part of this whole, and using the appropriate statistical methods, one can make valid inferences about the whole population from examining a small part" (Tr. 116). He concluded that his own sample of Arkansas counties "is a very reliable sample under the restrictions that we were confined to, the number of counties that could be investigated during the time allotted. In other words, for the size of the sample, the 19 counties, it was a very reliable and highly acceptable sample insofar as sampling statistics are concerned" (Tr. 118; see also Tr. 130, 132). "I would say that, as far as the sample is concerned, the inferences drawn from this sample, as described, are valid for the State of Arkansas" (Tr. 135). See 398 F.2d at 144; A. 54.

(These conclusions were not questioned by the courts below, although, as we shall see, both courts were concerned over the circumstances that Mr. Monroe's areal sampling methods resulted in the selection of counties that lie principally in the southern and eastern portions of the State. This circumstance was apparently not thought to impugn the sample's *factual* representativeness—to the contrary, as the record shows and the district court found (257 F. Supp. at 720; A. 38), the sampling method was "acceptable statistically"—but it was given importance by the *legal* theory of both courts that petitioner was required to show that Garland County, not the State of Arkansas as a

whole, applied the death penalty for rape discriminatorily. Notwithstanding this legal conception, neither court below contested the uncontradicted factual assertions of Mr. Monroe, as an expert statistician, that conclusions drawn from data gathered in his sample counties would be valid for the State of Arkansas. See 398 F.2d at 144; A. 53-55.)

2. Data Concerning the Critical Variables (Race and Sentence) and Statistical Analysis of the Relationship Between Them.

For each individual case of conviction of rape, data were gathered as to race of defendant, race of victim, and sentence imposed (Tr. 28-30).[6a] Using approved statistical techniques, analysis was performed to determine the relationship among these variables (Petitioner's Exhibit P-4, pp. 2-4). Briefly, the analysis involved these steps: (a) erection of a scientifically testable "null hypothesis" "asserting there is no difference in the distribution . . . of the sentence of death or life imprisonment imposed on Negro or white defendants" (Tr. 30-31; see also Tr. 31-32); (b) calculation of a "theoretical or expected frequency" (Tr. 33) which represents the number of Negro defendants and the number of white defendants (or, more specifically, the number of Negro defendants convicted of rape of white victims, and of all other defendants) who would be expected to be sentenced to death if the null hypothesis (that sentence is not related to race) were valid (Tr. 32-33); (c)

[6a] The sources from which these data, and other data relating to the individual cases of rape convictions studied, were obtained is described in detail in Petitioner's Exhibit P-3, pp. 1-6. See note 8a, *infra*. Because the accuracy of all the basic data was conceded by the respondent below, see text *supra* at pp. 1a-3a, methods of data collection and data sources were not developed at the hearing, and Exhibit P-3 was put in merely for the information of the court.

comparison of this "theoretical or expected frequency" with the frequency of death sentences actually observed in the collected data for each racial combination of defendants and victims; and (d) determination whether the discrepancy between the expected and observed frequencies is sufficiently great that, under generally accepted statistical standards, that discrepancy can be said to be a product of the real phenomena tested, rather than of the operation of chance within the testing process, sampling, etc. (Tr. 33-37). "If that difference reaches a sufficiently high proportion, sufficiently high number, then the assertion can be made, using again the traditional cut-off point,[7a] that the difference is significant and could not have occurred by chance" (Tr. 34). See 398 F.2d at 142; A. 50. The result of this analysis, then, is the determination whether there is a relationship or "association" between Negro defendants convicted of rape of white victims and the death sentence imposed by Arkansas juries; and if so, whether that relationship or association is "significant" in the statistical sense that the possibility of its occurrence by chance is so slight as properly to be discounted. (See Petitioner's Exhibit P-4, pp. 2-4.) (As we shall see *infra*, such a relationship, showing disproportionately frequent death sentencing of Negroes convicted of rape of white victims, was in fact established by the data.)

[7a] Dr. Wolfgang explained in considerable detail the procedures by which relations among items of observed data are tested statistically for reliability, "not only in sociology and social sciences, but other disciplines as well, . . . such as medical research" (Tr. 36). The basic procedure used in the present study—the chi-square method of statistical analysis and the traditional measure of statistical "significance" which treats as real observed relationships that could not have occurred more than five times out of one hundred by chance (expressed in the formula $P < .05$)—is described at Tr. 33-37, with explication of these matters by reference to the familiar example of head-or-tail coin tossing.

Appendix A

3. Data Concerning "Control" Variables.

Data gathering did not stop, however, with the facts of race and sentence. As explained by Dr. Wolfgang, data were collected on numerous other circumstances attending each case of conviction for rape that "were felt to be relevant to the imposition of the type of sentence" (Tr. 40). These data were sought by the exhaustive inquiries that occupy 28 pages of small type on the data-gathering form that is Petitioner's Exhibit P-2—inquiries concerning the defendant (age; family status; occupation; prior criminal record; etc.), the victim (age; family status; occupation; husband's occupation if married; reputation for chastity; etc.), defendant-victim relationship (prior acquaintance if any; prior sexual relations if any; manner in which defendant and victim arrived at the scene of the offense), circumstances of the offense (number of offenders and victims; place of the offense; degree of violence or threat employed; degree of injury inflicted on victim if any; housebreaking or other contemporaneous offenses committed by defendant; presence *vel non* at the time of the offense of members of the victim's family or others, and threats or violence employed, or injury inflicted if any, upon them; nature of intercourse; involvement of alcohol or drugs; etc.), circumstances of the trial (plea; presentation *vel non* of defenses of consent or insanity; joinder of defendant's rape trial with trial on other charges or trial of other defendants; defendant's representation by counsel (retained or appointed) at various stages of trial and sentencing; etc.), and circumstances of post-trial proceedings if any. See 398 F.2d at 142; A. 50-51.

The district court aptly characterized these factors as "Generally speaking, and subject to certain exceptions, . . . variables . . . which reasonably might be supposed to either

aggravate or mitigate a given rape" (257 F. Supp. at 718 n. 8; A. 35, n. 8). Their exhaustive scope appears upon the face of Petitioner's Exhibit P-2, and from Dr. Wolfgang's testimony: "The principle underlying the construction of the schedule [Petitioner's Exhibit P-2] was the inclusion of all data that could be objectively collected and transcribed from original source documents that were available to the investigators—the field investigators—such as appeal transcripts, prison records, pardon board records, and so forth, and whatever was generally available was included. In this sense, it was a large eclectic approach that was used for the purpose of assuring ourselves that we had all available data on these cases" (Tr. 96-97; see also Tr. 65-70). Dr. Wolfgang conceded that some data potentially pertinent to sentencing choice were not collected—for example, strength of the prosecution's case in each individual rape trial—but explained that this was because such items were not information "that we could objectively collect" (Tr. 97). See 398 F.2d at 142; A. 51.

The pertinency of these data to the study was that some of the many circumstances investigated, "rather than race alone, may play a more important role in the disproportionate sentencing to death of Negro defendants convicted of raping white victims" (Tr. 40).

> "These factors, not race, it could be argued, may be determining the sentencing disposition; and Negroes may be receiving death sentences with disproportionate frequency only because these factors are disproportionately frequent in the case of Negro defendants. For example, Negro rape defendants as a group, it may be contended, may employ greater violence or do greater physical harm to their victims than do white rape defendants; they may more frequently be repre-

sented at their trials by appointed rather than retained counsel, and they may more frequently commit contemporaneous offenses, or have a previous criminal record, etc." (Dr. Wolfgang's written report, Petitioner's Exhibit P-4, p. 5.)

In order to determine whether the control variables explained or accounted for the racial disproportion in death sentencing, analysis had to be made of the relationship between each such factor for which data were available and sentence on the one hand, race on the other. Dr. Wolfgang explained that no variable could account for the significant association between Negro defendants with white victims and the death sentence unless that variable "was significantly associated with the sentence of death or life" (Tr. 41), and unless it *also* was significantly associated with Negro defendants convicted for rape of white victims (Tr. 41-42).

A variable, even though associated with such Negro defendants (i.e., found disproportionately frequently in their cases), could not furnish a non-racial explanation for their over-frequent sentence to death unless it was itself affecting the incidence of the death sentence (as evidenced by its significant association with the death sentence) (see, e.g., Tr. 45-46); while a variable which was *not* associated with Negro defendants convicted of rape of white victims could also not explain the frequency with which they, as a class, were sentenced to death (e.g., Tr. 49-52). See generally Petitioner's Exhibit P-4, pp. 6-7.

4. Results and Conclusions.

Based on his study of the data gathered for the twenty years 1945-1965 in the State of Arkansas, Dr. Wolfgang con-

cluded categorically that "*compared to all other rape defendants, Negroes convicted of raping white victims were disproportionately sentenced to death.*" (Dr. Wolfgang's written report, Petitioner's Exhibit P-4, p. 8, para. 3 (original emphasis).) "We found a significant association between Negro defendants having raped white victims and the disproportionate imposition of the death penalty in comparison with other rape convictions." (Tr. 52; see also Tr. 37-39.) Indeed, the disparity of sentencing between Negroes with white victims and all other racial combinations of convicted defendants and victims was such that it could have occurred less than twice in one hundred times by chance (Tr. 37-38)—i.e., if race were not really related to capital sentencing in Arkansas, the results observed in this twenty-year study could have occurred fortuitously in two (or less) twenty-year periods since the birth of Christ. Thus, the Wolfgang study convincingly documents the discrimination which previously available data—collected less systematically or in a form permitting less rigorous scientific analysis—also suggests: for example, the Federal Bureau of Prisons' National Prisoner Statistics for executions during the period 1930-1962 (Petitioner's Exhibit P-6, Tr. 99-101), which disclosé that more than nine times as many Negroes as whites were put to death for rape during this period in the United States. See also pp. 13-16, *supra*, of this brief.

A considérable part of Dr. Wolfgang's testimony was addressed to the question whether this disproportion could be explained away or accounted for by the operation of other, non-racial ("control") variables. He testified that after the Arkansas data were collected, he considered and subjected to analysis every such variable or factor about which sufficient information was available to support scientific study (Tr. 56, 64-65, 78-80, 97). With respect to a substantial

number of the variables investigated by the field researchers, their exhaustive exploration[5a] failed to provide enough

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[5a] By reason of the court's pre-trial order and respondent's concession under the procedures fixed by that order that the responses recorded by the field researchers on the individual case schedules were accurate (see pp. 1a-3a, *supra*), petitioner did not present in any systematic fashion below testimony relating to the data-gathering procedures. The concession, of course, included the accuracy of the response "unknown" wherever that appeared on a schedule, and—as counsel for petitioner pointed out in the district court, without disagreement from respondent or the court—the response "unknown" "means that research, using the State's records and using all of the resources that we have poured into this case, is unable to make any better case than this" (Tr. 153-156).

The nature of the research effort involved is indicated by Petitioner's Exhibit P-3 (Tr. 25-27, 57), the instructions to the field researchers. These instructions include the following, at pp. 4-6:

> "Whether the work is done by a single researcher or divided among more than one, the course of investigation of any specific case will ordinarily involve the following steps:
>
> "(1) Inspection of the county court docket books for entries relating to the case.
>
> "(2) Inspection of all other records relating to the case available at the county court: file jackets, transcripts, witness blotters, letter files, pre-sentence reports.
>
> "(3) Inspection of appellate court records in any case where appeal was taken. Appellate court records include the docket of the appellate court, its file jacket, record on appeal (if maintained on file in the appellate court), court opinion or opinions if any, and appellate court clerk's letter file.
>
> "(4) Inspection of prison records of the defendant if he was incarcerated in a prison which maintains records.
>
> "(5) Inspection of pardon board records in any case where the defendant submitted any application for executive clemency.
>
> "(6) If the foregoing sources fail to provide sufficient information to complete the schedule on the case, interview of defense counsel in the case.
>
> "(7) If the foregoing sources fail to provide sufficient information to complete the schedule on the case, inspection of local and area newspaper files for items pertaining to the case.
>
> "Three general directives should be kept in mind.
>
> "(A) We are concerned with the sentencing decision, in each case, of a particular official body at a particular time

information for study. (E.g., victim's reputation for chastity, Tr. 79.) Notwithstanding respondent's pre-trial

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(i.e., the trial judge or jury; the pardon board). Every such body acts—can act—only on the facts known to it at the time it acts. For this reason, the "facts" of a case called for by the schedule mean, so far as possible, the facts perceived by the sentencing body. Facts which we know to have been known to the sentencing body are preferred facts, and sources which disclose them are preferred sources. (A trial transcript, where it exists, is therefore the most desirable source of facts.) Other sources are of decreasing value as the likelihood decreases that the facts which they disclose were known to the sentencing body. (A newspaper story which purports to report trial testimony, therefore, is to be preferred to one which purports to report the facts of the offense on the basis of other sources of information.)

"(B) After this survey is completed, its results will be made the basis for allegations of fact in legal proceedings. If the allegations are controverted, it will be necessary to prove them, and the proof will have to be made within the confines of ordinary evidentiary rules, including the hearsay principle, best evidence rule, etc. For this reason, sources of facts which are judicially admissible evidence to prove the facts which they disclose are preferred sources. Official records are most desirable in this dimension; then the testimony of witnesses having knowledge of the facts (for example, defense counsel), finally, secondary written sources (for example, newspapers). Wherever an official record or document may contain pertinent information, inspect it yourself if you can; don't take somebody's word for what is in it.

"(C) Many of the facts you need to know will have been contested in the judicial and post-judicial proceedings leading to a defendant's sentence and its execution. We have no method for resolving factual disputes or, ordinarily, for knowing how the triers of fact resolved them. As an invariable rule, then, the facts should be reported in the light most favorable to the prosecution, and most unfavorable to the defendant, in every case. If a trial transcript exists, and if it contains the testimony of the complaining witness and of the defendant, resolve all conflicts of testimony in favor of the complaining witness and report the facts as they might reasonably have been found by a jury which credited the complaining witness, drew all rational inferences from her

concession of the accuracy of the field researchers' responses on the individual case schedules, including the response "unknown" where that appeared (see note 8a *supra*), counsel for respondent attempted to suggest in cross-examination of Dr. Wolfgang that these gaps in information impugned the underlying data-gathering process. Dr. Wolfgang replied:

> "the absence of information, I would be unwilling to assert is due to lack of any effort. Very diligent efforts were made by the field investigators to collect the information—from court clerks, from police records, from prisons, from other sources available in the community—and they were instructed to follow down each piece of information, each source of information to its fullest extent, so that I have no reason to doubt that the effort was made to collect the data" (Tr. 80).

His testimony as a whole makes it clear that—although, as he put it: "Information is always limited" (Tr. 72)—he was confident that he had enough of it to support his conclusions. (See particularly Tr. 76-79.)

He was able to subject twenty-two "quite relevant variables" (Tr. 78)—in addition to race of defendant, race of victim, and sentence—to analysis. (See Petitioner's Exhibit P-4, Appendix A; Tr. 29, 52.) Most of these were not significantly associated with sentence, and so Dr. Wolf-

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testimony most strongly against the defendant, discredited the defendant, and refused to draw any disputable inferences in his favor. Treat all other sources in a similar fashion. In interviews with defense counsel, try to impress upon counsel that you have to have the facts as they might have appeared in the worst light for his client. In reading newspaper items which give conflicting versions of the facts, adopt the version most unfavorable to the defendant."

gang could assert categorically that they did not account for or explain the disproportionately frequent death sentencing of Negroes with white victims (Tr. 42-46, 53-54). These variables included the defendant's age, whether he was married, whether he had dependent children, whether he had a prior criminal record; the victim's age, whether she had dependent children; whether the defendant and victim were strangers or acquaintances prior to the offense; place where the offense occurred (indoors or outdoors), whether the defendant committed an unauthorized entry in making his way to that place; whether the defendant displayed a weapon in connection with the offense; degree of seriousness of injury to the victim; and the defendant's plea (guilty or not guilty), type of counsel (retained or appointed), and duration of trial (Tr. 47, 53; Petitioner's Exhibit P-4, p. 9, para. 5; Petitioner's Exhibit P-5). Two variables were shown to bear significant association with sentence: death sentences were more frequent in the cases of defendants who had a prior record of imprisonment, and in the cases of defendants who committed other offenses contemporaneously with the rape. But because these variables were not associated with race,[9a] Dr. Wolfgang concluded that they also could not account for the fact that Negroes convicted of rape of white victims were disproportionately often sentenced to death (Tr. 47-52, 54; Petitioner's Exhibit P-4, pp. 8-9, para. 4; Petitioner's Exhibit P-5). Other variables appeared so frequently or so in-

[9a] Statistical analysis of the association between these variables and race of the defendant disclosed no significant association. When defendant-victim racial combinations were considered, the numbers of cases for which information was available became too small for statistical treatment, but on the basis of trend of association, Dr. Wolfgang concluded that here too there was no association of significance.

frequently in the total population of cases studied that statistical analysis of them was "unnecessary and impossible": the fact that they appeared to characterize all cases (or no cases), irrespective of sentence or of racial combinations of defendant and victim, pointed to the conclusion that they were not available explanations for the relationship observed between death sentences and Negroes with white victims. These variables included the victim's reputation for chastity and prior criminal record; whether the defendant and victim had had sexual relations prior to the occasion of the rape; the degree of force employed by the defendant; whether the victim was made pregnant by the rape; and whether the defendant interposed a defense of insanity at trial (Tr. 54-55, 94-95, Petitioner's Exhibit P-5). Summarizing, Dr. Wolfgang found that no variable of which analysis was possible could account for the observed disproportionate frequency of sentencing to death of Negroes convicted of rape of white victims (Tr. 56-57). His ultimate conclusion was:

> "On the basis of the foregoing findings, it appears that Negro defendants who rape white victims have been disproportionately sentenced to death, *by reason of their race*, during the years 1945-1965 in the State of Arkansas." (Dr. Wolfgang's written report, Petitioner's Exhibit P-4, pp. 13-14 (emphasis added).)

B. *The Opinion of the District Court.*

Although respondent presented no evidence of any sort in rebuttal, the district court disagreed with Dr. Wolfgang's conclusions. It accepted his finding that the differential sentencing to death of Negroes with white victims "could not be due to the operation of the laws of chance"

(257 F. Supp. at 718; A. 35); but supposed, again without any sort of evidentiary presentation by the State, that it might be due to some factor respecting which statistical analysis had not been possible, such as the issue of consent in rape cases (257 F. Supp. at 720-721; A. 40). The Court remarked that the "variables which Dr. Wolfgang considered are objective . . . broad and in instances . . . imprecise"; that in many of the individual rape cases studied "the field workers were unable to obtain from available sources information which might have been quite pertinent"; and that "Dr. Wolfgang's statistics really reveal very little about the details" of comparative individual cases of rape. (257 F. Supp. at 720; A. 39.) While recognizing that "the sample drawn by Mr. Monroe seems to have been drawn in a manner which is acceptable statistically" (257 F. Supp. at 720; A. 38), the court noted that the counties randomly chosen had turned out not to be evenly geographically dispersed, and not to include many counties of sparse Negro population (*ibid.*). Garland County, which was not itself included in the sample, is a county of sparse Negro population located in a portion of the State in which the sample counties fell less frequently than elsewhere. For those reasons, the district court declined to conclude that "the Garland County jury which tried petitioner was motivated by racial discrimination when it failed to assess a punishment of life imprisonment" (257 F. Supp. at 719; A. 37)—(a subjective proposition, parenthetically, which petitioner's counsel had explicitly disavowed any intention to undertake to prove). With regard to the State of Arkansas generally, the district court thought that the "cases studied, and the number of death sentences imposed are simply too few in number to afford convincing proof" of racial discrimination (257 F. Supp. at 720; A. 38).

Placing some reliance on the language in Dr. Wolfgang's written report to the effect that the report was "preliminary" and "tentative" (257 F. Supp. at 720; A. 39), the court concluded:

> "On the meager material before it the Court is simply not prepared to convict Arkansas juries of unconstitutional racial discrimination in rape cases. As a matter of fact, the Court doubts that such discrimination, which is a highly subjective matter, can be detected accurately by a statistical analysis such as was undertaken here. Statistics are elusive things at best, and it is a truism that almost anything can be proved by them." (257 F. Supp. at 720; A. 39-40; see also 257 F. Supp. at 719-720; A. 37-38.)

C. *The Opinion of the Court of Appeals.*

The court of appeals agreed with the district court in rejecting petitioner's contention that his death sentence must be set aside by reason of racial discrimination in capital sentencing—but for somewhat different reasons. "Like the trial court, . . . although perhaps not for each and all of the reasons it advanced, we feel that the [statistical] argument does not have validity and pertinent application to Maxwell's case." (398 F.2d at 146; A. 59.) "What we are concerned with here is Maxwell's case and only Maxwell's case." (398 F.2d at 147; A. 60.)

The court of appeals, in general, appears to concede the validity of Dr. Wolfgang's methodology, and even of his conclusion that a pattern of racial discrimination has been shown. (398 F.2d at 146-148; A. 59-64.) It finds that Dr. Wolfgang testified his report was "preliminary" only "in the sense that the other states for which data was being col-

lected would be included in the final report." (398 F.2d at 143; A. 52-53.) And the court accepts that there are "recognizable indicators" "that the death penalty for rape may have been discriminatorily applied over the decades in that large area of states whose statutes provide for it."[10a] Nevertheless the court holds, in effect, that this statistical showing of discrimination is irrelevant because it does "not show that the petit jury which tried and convicted Maxwell acted in his case with racial discrimination" (398 F.2d at 147; A. 60) or that *Maxwell himself* "was the victim of discrimination based on race" (398 F.2d at 148; A. 64.)

> "[W]hatever . . . suspicion it may arose [sic] with respect to southern interracial rape trials as a group over a long period of time, and whatever it may disclose with respect to other localities, we feel that the statistical argument does nothing to destroy the integrity of Maxwell's trial." (398 F.2d at 147; A. 61-62.)

This is so because the Arkansas statistics "do not relate specifically to Garland County where this particular offense was committed and where Maxwell was tried and convicted." (398 F.2d at 146; A. 59.)

> "[W]hile it is true that it is in a sense the state which prosecutes, nevertheless the county has a char-

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[10a] (398 F.2d at 148; A. 63.) Despite the generality of the court's language, this finding must relate specifically to the State of Arkansas. This is so because no proof was offered on this record of the results of the Wolfgang study in other States. The only evidence of record with regard to areas outside Arkansas was Petitioner's Exhibit P-6, the National Prisoner Statistics. These show raw numbers of executions for rape and murder, by race, for all the States. (See pp. 13-15 n. 11, *supra.*) They do no more than show that Dr. Wolfgang's conclusions for Arkansas are conformable to the national pattern. Thus, if there is south-wide discrimination, there is most assuredly discrimination in Arkansas.

acter, too. . . . Yet the Garland County statistics [produced in the earlier habeas corpus proceeding] . . . afford no local support to the petitioner's statistical argument. The evidence produced at the prior hearing and at this one discloses only Maxwell as a recipient of the death penalty in Garland County for rape.

". . . [W]e are not yet ready to nullify this petitioner's Garland County trial on the basis of results generally, but elsewhere, throughout the South." (398 F.2d at 147; A. 61.)

We think it apparent, on a fair reading of the court of appeals' opinion, that that court found unavoidable Dr. Wolfgang's conclusion concerning racial discrimination in capital sentencing by Arkansas juries in rape cases. At the very least, the court of appeals explicitly admitted that there are "recognizable indicators" and "ground for suspicion that the death penalty for rape may have been discriminatorily applied over the decades in that large area of states whose statutes provide for it." (398 F.2d at 148; A. 63.)

APPENDIX B

Available Information Relating to the Proportion of Persons Actually Sentenced to Death, Among Those Convicted of Capital Crimes.

It is exceptionally difficult to obtain information which will permit construction of a reliable estimate concerning the proportion of persons actually sentenced to death,* among all those convicted of capital crimes. In order to calculate this proportion, two comparable figures are required: the number of persons convicted of a given capital offense, and the number of persons sentenced to death for it. The figures must be *comparable* in the sense that they relate to the same jurisdiction, the same period of time, and the same offense.

Figures for the number of death sentences imposed *during recent years, for each of the several capital offenses*, in each of the capital punishment jurisdictions, may be ascertained albeit somewhat laboriously from data reported in the National Prisoner Statistics Bulletins on *Executions*. The relevant tables may often in the footnotes,** which also

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* By persons actually sentenced to death we mean persons upon whom the sentencing authority, judge or jury, imposes a death sentence. We do not mean to take account of later judicial decisions or executive clemency or of any other factor that may result in the initial death sentence not being carried out.

** The National Prisoner Statistics Bulletins on *Executions* are published annually. The latest is United States Department of Justice, Bureau of Prisons, National Prisoner Statistics, No. 37, Executions 1961 [1962], June 1962. In the columns below we list the numbers and titles of the issues relied upon in this Appendix, the abbreviations which will hereafter be used to designate each, and the pages and tables of each that contain pertinent information.

Number, title, date	Abbreviation	Page and table
No. 29, *Executions 1951*, April 1952	NPS 1951	p. unnumbered, table 5

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sets forth the citation form that will be used hereafter to describe each bulletin. There are several problems with the tables as sources of information relating to the number of persons sentenced to death. First, the figure which they report represents the number of persons received by the respective state penitentiaries from the courts, each year, under sentence of death. This may be fewer than the actual number of death sentences imposed in some states, where the practice is to hold a death-sentenced man in a local facility pending post-verdict motions and or appeals. Second, for this or other reasons, a few death sentences imposed each year are not reported to the NPS until the following year. The latest NPS Bulletin gives revised figures for prisoners received from court under sentence of death for each year since 1961 (NPS (1967), p. 12, table 4); but these figures are not broken down by jurisdiction and offense. Figures broken down by jurisdiction and offense must be taken from the earlier annual reports, and have not been revised.

But these problems are inconsequential compared to those of ascertaining comparable figures relating to the

Number, title, date	*Abbreviation*	*Page and table*
No. 32, Executions 1962 (April, 1963)	NPS (1962)	p. unnumbered, table 5
No. 34, Executions 1930-1963 (May, 1964)	NPS (1963)	p. 14, table 5
No. 37, Executions 1930-1964 (April, 1965)	NPS (1964)	p. 14, table 4
No. 39, Executions 1930-1965 (June, 1966)	NPS (1965)	p. 14, table 4
No. 41, Executions 1930-1966 (April, 1967)	NPS (1966)	p. 13, table 4
No. 42, Executions 1930-1967 (June, 1968)	NPS (1967)	pp. 12-17, tables 4-7

number of convictions for capital offenses. Conviction figures are almost nowhere published. The rare published figures suffer from assorted woes that virtually destroy their usefulness. Some states report judicial statistics for fiscal years, making comparison with the calendar-year NPS reports difficult. Most states report conviction figures for categories of cases ("murder"; "sexual offenses") that include, but are not entirely composed of, capital crimes. Many states report not conviction figures, but figures concerning the number of commitments to the state penitentiary under conviction and sentence for given offenses. These figures omit large numbers of convicted persons: namely, those sentenced to imprisonment in local facilities, or to probation, or whose sentences are suspended. Secondary sources reporting conviction figures suffer from the same defects and often, in addition, they report totals for a span of years that includes both a period of mandatory capital sentencing and a succeeding period of discretionary capital sentencing within a jurisdiction.

Confronted with these problems, we adopt the approach of setting out below all of the information we can find relating to the question of what proportion among all convicted capital offenders are actually sentenced to death. The information comes from a variety of states, for a variety of periods, and has a variety of problems. We report each item separately, and explain its problems as we see them.

A. *Rape.*

1. Partington appears to say that, between 1908 and 1963, there were 2,298 offenders committed to the Virginia State Penitentiary upon convictions for the capital crimes

of rape, attempted rape, statutory rape, and attempted statutory rape. There were 68 death sentences in this group, including two imposed upon defendants who had been convicted of capital robbery as well as the sexual offense. For rape alone, there were 1365 commitments, including 41 death sentences. The principal problem with these figures appears to be that the commitment figures are doubtless considerably lower than the number of capital convictions, since some capital offenders would have received jail terms, probation, or suspended sentences. Partington, *The Incidence of the Death Penalty for Rape in Virginia*, 22 Wash. & Lee L. Rev. 43, 43-44, 71-73 (1965).

2. Johnson reports that in North Carolina, between July 1, 1938 and December 31, 1953, there were 382 convictions for rape, as compared with 32 death sentences (admissions to death row) upon conviction for rape. The conviction figure seems unduly low, even considering the availability to the jury of verdicts for lesser offenses. Johnson, *Selective Factors in Capital Punishment*, 36 Social Forces 165, 166 (1957).

3. In the federal courts, where rape is capitally punishable under both the federal code and the District of Columbia Code, there appear to have been a total of 111 rape convictions between July 1, 1961 and June 30, 1966, excluding the fiscal year 1964-1965, for which no figure is reported. For the calendar years 1961 through 1966, no death sentences were imposed for rape by a federal court. Conviction figures are taken from table D3 in the Annual Reports of the Director of the Administrative Office of the United States Courts for the years 1962-1966; death sentence figures from NPS (1964) through NPS (1966).

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4. Dr. Wolfgang's study of rape convictions in the State of Arkansas described in Appendix A to this brief uncovered 55 instances of conviction for rape in 19 counties over the period 1945-1965. (This figure excludes a few cases which were not subjected to analysis for want of essential information relating to them.) In 14 of the cases, the death sentence was imposed. See Petitioner's Exhibit P-4, Appendix B, table 1.

5. There appear to have been 96 commitments under conviction for capital rape offenses in Florida between July 1, 1964 and June 30, 1966. During the three calendar years encompassing these two fiscal years, 8 men were sentenced to die for rape. Florida Division of Corrections, Fifth Biennial Report (July 1, 1964-June 30, 1966) (1966) 74-75; NPS (1964); *id.* (1965); *id.* (1966).

6. There appear to have been 89 commitments under conviction for rape and assault with intent to rape in Maryland between July 1, 1965 and June 30, 1966. During the two calendar years encompassing that one fiscal year, 2 men were sentenced to die for rape offenses. (During these years all rape and assault with intent to rape were capital in Maryland.) State of Maryland, Department of Correction, Fortieth Report (July 1, 1965 - June 30, 1966) (1966) 36; NPS (1965); *id.* (1966).

7. There appear to have been 186 commitments under conviction for rape in Georgia between July 1, 1964 and June 30, 1967. During the four calendar years encompassing these three fiscal years, 8 men were sentenced to die for rape. State of Georgia Board of Corrections, Annual Report (July 1, 1964 - June 30, 1965) (1965) 56; *id.* (July 1, 1965 - June 30, 1966) (1966) 52; *id.* (July 1, 1966 - June 30, 1967) (1967) 39; NPS (1964); *id.* (1965); *id.* (1966); *id.* (1967).

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8. There appear to have been 21 commitments under conviction for rape in Tennessee between July 1, 1965 and June 30, 1966. During the two calendar years encompassing this fiscal year, 5 men were sentenced to die for rape in the state. TENNESSEE DEPARTMENT OF CORRECTION, DEPARTMENTAL REPORT (Year ending June 30, 1966) (pages unnumbered; chart designated: "Offenses Committed"); NPS (1965); *id.* (1966).

9. Because of the extreme paucity of available data relating to the question dealt with in this Appendix, we venture to set forth the figures discovered in Dr. Wolfgang's study of several other states, although as yet unpublished.[*] Data from six states, in addition to Arkansas, have thus far been analyzed. We give the respective numbers of rape convictions and death sentences for rape during the period 1945-1965 in a representative sample of counties for each state (again excluding cases eliminated from analysis because of lack of essential information).

State	*Rape Convictions*	*Death Sentences*
Alabama	185	20
Florida	218	36
Georgia	369	47
Louisiana	125	22
South Carolina	394	26
Tennessee	213	18

[*] We feel that there is no impropriety in presenting these figures for the information of the Court, since they serve to cast light on an obscure and essentially non-controversial point. We have of course abstained from making reference to Dr. Wolfgang's findings relating to the impact of racial factors on capital sentencing in other states than Arkansas, since that issue is a more controversial one.

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B. *Murder.*

1. Wolfgang reports that in Philadelphia during the period 1948-1952 there were 77 convictions of first degree murder, as compared with 7 death sentences. WOLFGANG, PATTERNS IN CRIMINAL HOMICIDE (Science ed., Wiley, 1966) 305-306, table 36.

2. Kalven and Zeisel report 21 death sentences out of a sample of 111 murder cases tried in the years 1954, 1955 and 1958 in which a jury returned a verdict of guilty of a capital degree of the offense, and the presiding judge agreed with their guilty verdict. KALVEN & ZEISEL, THE AMERICAN JURY (1966) 435-436.

3. Johnson reports that in North Carolina, between July 1, 1938 and December 31, 1953, there were 742 convictions for first degree murder, as compared with 162 death sentences (admissions to death row) upon conviction for first degree murder. Johnson, *Selective Factors in Capital Punishment*, 36 SOCIAL FORCES 165, 166 (1957).

4. Bedau reports that in New Jersey, between 1916 and 1955, 497 persons were committed to the state penitentiary with life sentences for murder, while 157 persons were sentenced to death for murder. (These are all first degree cases, it would appear, since New Jersey law does not permit life imprisonment for second degree murder. The death penalty for first degree murder was made discretionary in 1916.) The problem here is that the figures for conviction include both jury convictions (entailing jury discretion to sentence to life or death) and court convictions upon a plea of *non vult* (which, under New Jersey law, precludes the death penalty). Bedau, *Death Sentences in New Jersey 1907-1960*, 19 RUTGERS L. REV. 1, 30 (1964).

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Between 1956 and 1960 in New Jersey, Bedau finds 61 first degree murder convictions, resulting in 13 death sentences and 48 life sentences (17 on a jury verdict and 31 on a plea of *non vult*). *Id.* at 51.[a] These figures may relate only to male convicts, since Bedau received his conviction figures from Edwin Wolf (see next paragraph), who studied the prison records of convicted male offenders.

5. Wolf reports that of 159 convictions by a jury of a male offender for the offense of first degree murder in New Jersey between 1937 and 1961, 62 resulted in a death sentence and 97 in a sentence of life imprisonment. Wolf, *Abstract of Analysis of Jury Sentencing in Capital Cases: New Jersey: 1937-1961*, 19 RUTGERS L. REV. 56, 60 (1964).

6. In the federal courts, where first degree murder is capitally punishable under both the federal code and the District of Columbia Code, there appear to have been a total of 11 convictions for this offense between July 1, 1961 and June 30, 1966, excluding the fiscal year 1964-1965, for which no figure is reported. During the calendar years 1961 through 1966, 2 death sentences were imposed by federal courts for murder. Note that the death-sentence figure relates to a period of six years, including the four for which the conviction figure is given. This awkward form of comparison is necessitated by the problem of relating calendar to fiscal years. Conviction figures are taken from table D6 in the Annual Reports of the Director of the Administrative Office of the United States Courts for the years 1962-1966; death-sentence figures from NPS (1961) through NPS (1966).

[a] The figure "60" in the lower right-hand cell of table XXVIII ought to be "61." This is so because the figure "4" in the last column for the year 1958 is a typographical error and should read "5."

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7. California reports 88 first degree murder convictions during 1967, as compared with 17 death sentences. STATE OF CALIFORNIA, DEPARTMENT OF JUSTICE, DIVISION OF LAW ENFORCEMENT, BUREAU OF CRIMINAL STATISTICS, REPORT (CRIME AND DELINQUENCY IN CALIFORNIA, 1967) (1968) 140; NPS (1968).

8. There appear to have been 78 commitments under conviction for first degree murder in Florida between July 1, 1964 and June 30, 1966. During the three calendar years encompassing these two fiscal years, 16 men were sentenced to die for first degree murder. FLORIDA DIVISION OF CORRECTIONS, FIFTH BIENNIAL REPORT (July 1, 1964-June 30, 1966) (1966) 74-75; NPS (1964); *id.* (1965); *id.* (1966).

9. There appear to have been 28 commitments under conviction for first degree murder in Maryland between July 1, 1965 and June 30, 1966. During the two calendar years encompassing that one fiscal year, 4 men were sentenced to die for first-degree murder. MARYLAND DEPARTMENT OF CORRECTION, FORTIETH REPORT (July 1, 1965—June 30, 1966) (1966) 36; NPS (1965); *id.* (1966).

10. There appear to have been 269 commitments under conviction for murder in Georgia between July 1, 1964 and June 30, 1967. During the four calendar years encompassing these three fiscal years, 12 men were sentenced to die for murder. (During these years all murder was capital in Georgia, which recognized no degrees of the offense.) STATE OF GEORGIA BOARD OF CORRECTIONS, ANNUAL REPORT (July 1, 1964—June 30, 1965) (1965) 56; *id.* (July 1, 1965—June 30, 1966) (1966) 52; *id.* (July 1, 1966—June 30, 1967) (1967) 39; NPS (1964); *id.* (1965); *id.* (1966); *id.* (1967).

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11. There appear to have been 23 commitments under conviction for first degree murder in Tennessee between July 1, 1965 and June 30, 1966. During the two calendar-years encompassing this fiscal year, no men were sentenced to die for murder in the state. TENNESSEE DEPARTMENT OF CORRECTION, DEPARTMENTAL REPORT (Year ending June 30, 1966) (pages unnumbered; chart designated: "Offenses Committed"); NPS (1965); *id.* (1966).

* * *

In addition to the figures available for comparison, *supra*, national totals of commitments under sentence of death are reported. These alone give some sense of the extreme infrequency with which persons convicted of capital crimes are actually sentenced to death. Thirty-nine States, the District of Columbia, and the federal jurisdiction all have on their books statutes of general applicability punishing one or more offenses with death. In some States, half a dozen or more crimes may be so punishable.[a] Yet the following numbers of men were received under sentence of death in all of the prisons of the United States in the following years (NPS (1968), p. 12, table 4):

1961	140
1962	103
1963	93
1964	106
1965	86
1966	118
1967	85

[a] See Brief for the N.A.A.C.P. Legal Defense and Educational Fund, Inc., and the National Office for the Rights of the Indigent, as *Amici Curiae*, in *Boykin v. Alabama*, O.T. 1968, No. 642, Appendix A, pp. 1a-8a.

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NPS (1968), p. 13, table 5, breaks down the figure of 85 for the year 1967 as follows, by offense and race:

	White	Nonwhite	Total
Murder	36	38	74
Rape	1	6	7
Kidnaping	1	0	1
Robbery	0	1	1
Assault by Life Prisoner[6b]	2	0	2
Burglary	0	0	0
	40	45	85

[6b] This is a California offense, carrying a mandatory death sentence.

APPENDIX C

Manner of Submission of the Death-Penalty Issue at Petitioner Maxwell's Trial.

The only instruction to the jury at Maxwell's trial relating to its sentencing function was the following passage, which concluded a lengthy instruction dealing with the substantive law of rape and the principle that, to convict the defendant of rape, the jury must find him guilty beyond a reasonable doubt:

> "If you find the defendant guilty, you will say: 'We the Jury, find the defendant guilty of rape as charged in the information.' If you bring in that verdict then the law fixes the punishment at death and it will be the duty of the Court to sentence him accordingly. But you may bring in this kind of verdict: 'We the Jury, find the defendant guilty of rape as charged in the information and fix his punishment at life imprisonment in the Penitentiary.' But if you find the defendant not guilty, or have a reasonable doubt of his guilt in the whole case, you will say: 'We the Jury, find the defendant not guilty.'" (Trial transcript, p. 332.)

The jury was given three verdict forms in the language just recited, which were read again to the jury before the case was submitted. (*Id.*, at p. 369.)

Supreme Court of the United States

[redacted]

[redacted]

[redacted]

[redacted] *Petitioner*

[redacted] Arkansas State Penitentiary,

Respondent

MOTION OF AMERICAN CIVIL LIBERTIES UNION, ILLINOIS DIVISION, AMERICAN CIVIL LIBERTIES UNION, AND ILLINOIS COMMITTEE FOR THE ABOLITION OF CAPITAL PUNISHMENT FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF *AMICI CURIAE*

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 622

WILLIAM L. MAXWELL,

Petitioner,

—v.—

C. E. BISHOP, Superintendent, Arkansas State Penitentiary,

Respondent.

Motion of American Civil Liberties Union, Illinois Division, American Civil Liberties Union, and Illinois Committee for the Abolition of Capital Punishment for Leave to File Brief *Amici Curiae*

The American Civil Liberties Union and the Illinois Committee for the Abolition of Capital Punishment move the Court for leave to appear as *Amici Curiae* in this case and to file a brief in support of the petitioner. Petitioner has consented to the filing of this brief. The respondent's attorney has not replied to our request.

The American Civil Liberties Union, an organization devoted to the preservation of a free and open society, principally through the Bill of Rights and the Fourteenth Amendment to the Constitution of the United States, has taken the position that capital punishment is inherently a civil liberties issue.

With leave of this Court, the Illinois Division of the American Civil Liberties Union filed an *Amicus Curiae* brief in *Witherspoon v. Illinois*, 391 U. S. 510 (1968). In that brief, and particularly in points III and IV (pp. 19-30), pertaining to the absence of legislative and judicial guidelines, the A.C.L.U. anticipated in some aspects the issues to which the grant of certiorari herein has been limited.

Capital punishment must be examined, not as if it were one among many punishments society chooses to impose upon its offenders, but one awful in contemplation and irrevocable in result. The issues as framed by this Court must be considered in light of the fact that the death penalty is withering away everywhere. The dramatic decline is shown by the fact that in 1968 there was not one execution in the entire country; in 1967, there were two executions, and in 1966 one. A substantial and growing segment of all Americans, probably a majority, is opposed to the death penalty. Yet almost 500 persons are now under sentence of death. This creates a moral and constitutional dilemma that must be confronted and resolved by this Court.

The Illinois Committee to Abolish Capital Punishment joins with the American Civil Liberties Union in this application. This Committee numbers in its membership leading citizens of the State of Illinois, of all religious faiths and professional, social and economic levels. It has been active in its field for several years and is familiar with

the problems involved herein. Counsel for Movants are members of the Committee.

Respectfully submitted,

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IN THE

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WILLIAM L. MAXWELL,

Petitioner,

—v.—

O. E. BISHOP, Superintendent, Arkansas State Penitentiary,

Respondent.

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, ILLINOIS DIVISION, AMERICAN CIVIL LIBERTIES UNION, AND ILLINOIS COMMITTEE FOR THE ABOLITION OF CAPITAL PUNISHMENT, *AMICI CURIAE*

Because the attorneys for *Amici* practice in Illinois, this brief will be devoted largely to the Illinois experience and will supplement what is before the court respecting Arkansas.

Presently twenty-one men and one woman are under the death sentence in Illinois. At the end of 1967, the last year for which full statistics have been published, Illinois had nineteen inmates on death row and ranked eighth among the states in the number of capital prisoners.

The Illinois experience has broad relevance to the case at bar because all of those awaiting execution in Illinois have been convicted of murder. Thus the Illinois cases

present the mainstream of the problem.* Furthermore, under Illinois law there is both a unitary trial and an absence of statutory and case law standards. Thus each of the questions upon which certiorari has been granted is an Illinois issue. There are, however, subtle differences between Illinois law and Arkansas law. Comment on these differences will put the issues at bar in broader perspective.

ARGUMENT

I.

The single verdict procedure violates the Fifth and Fourteenth Amendments.

The single verdict procedure became part of the law of Illinois by historical accident. The earliest statute on murder, enacted for the Northwest Territory, was the law of September 6, 1788. (Pease, Laws of the Northwest Territory—1788-1800, page 13). It provided tersely:

> "If any person or persons shall with malice aforethought, kill or slay another person, he, she, or they so offending shall be deemed guilty of murder, and upon conviction thereof shall suffer the pains of death."

Under this statute, there was no occasion to separate the issues of guilt or innocence from the issues of mitigation or aggravation, because there was only a single penalty for murder. The definition of the crime of murder varied somewhat over the years, but the sole statutory penalty

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* For 1967, of 435 individuals then under sentence of death nationally, 357 were sentenced for murder. National Prisoner Statistics—Executions No. 42, June 1968, Table 10, page 22.

provided for murder was death. (See the statute enacted for Illinois Territory in 1807, Philbrick, Pope's Digest, 1815, Volume 1, page 91.) It was re-enacted in the first criminal code of the State (Laws 1819, page 213, Section 2). (For later enactments see Revised Code of Laws, 1827, Criminal Code, Sections 22-24 and Rev. Stats., 1845, Chapter 30, Sections 22-24.)

In 1867, for the first time, the mandatory sentence of death for murder was abolished. In its place the jury was authorized to impose a sentence of death, life imprisonment, or a term of not less than 14 years. The humanitarian purposes of this statute are apparent from its text (Laws 1867, page 90):

> "That in all cases of felonies, which, by existing laws are punishable with death, it shall be competent for the jury empaneled, to return with their verdict of guilty, and as part of the same, either that the prisoner shall suffer death by hanging, as now provided by law, or that he be imprisoned in the penitentiary for the term of his natural life, or for a term of not less than fourteen years, as they may decide; and no person shall be sentenced to death by any court, unless the jury shall have so found in their verdict upon trial." *

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* The foregoing statute remained essentially unchanged until enactment of the Criminal Code of 1961, Illinois Revised Statutes 1967, Chapter 38, Secs. 1-7 (c) and 9-1.

Sec. 9-1 (b) provides:

A person convicted of murder shall be punished by death or imprisonment in the penitentiary for any indeterminate term with a minimum of not less than 14 years. If the accused is found guilty by a jury, a sentence of death shall not be im-

The Illinois Statutes were codified in the mid 1870's.[1] The earlier enactments, together with the 1867 amendment, appeared in the Revised Statutes of 1874, Chapter 38, §142, as follows:

> "Murder-Punishment. §142. Whoever is guilty of murder, shall suffer the punishment of death, or imprisonment in the penitentiary for his natural life, or for a term not less than fourteen years. If the accused is found guilty by a jury, they shall fix the punishment by their verdict; upon a plea of guilty, the punishment shall be fixed by the court. R. S. 1845, P. 155, §24; L. 1867, p. 90 §1."

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posed by the court unless the jury's verdict so provides in accordance with Section 1-7(c) (1) of this Code.

Sec. 1-7 (c) (1) provides:

Where, upon a trial by jury, a person is convicted of an offense which may be punishable by death, the jury may return a verdict of death. Where such verdict is returned by the jury, the court may sentence the offender to death or to imprisonment. Where such verdict is not returned by the jury, the court shall sentence the offender to imprisonment.

Thus under present law, the jury determines guilt and then may recommend the death penalty. It has no further role to play in sentencing. If the jury recommends death, the judge may impose death or a term of not less than fourteen years. If the jury does not recommend death, the judge may not impose death but only imprisonment.

Illinois law prior to 1961 was similar to Arkansas law in that the jury determined both the death sentence and the term of imprisonment. It differed in that under Illinois law the jury had to make a positive decision to fix the punishment at death, whereas under the Arkansas law in effect in the case at bar, it had only to find petitioner guilty of rape (without rendering a verdict of life imprisonment), whereupon the death sentence became mandatory (398 F. 2d 138, 139). (Of the 22 pending Illinois capital cases, two are subject to the pre-1961 law).

The 1874 codification preserved the purposes of the 1867 amendment, but the humanitarian history of the amendment was obscured.

In the century which has passed since 1867, our perception of the world and of man has undergone a revolution. The world of 1867, compared to today's, was relatively simple in its awareness of human motivation. It may have been enough then to give the jury a choice of punishments. The need for a two step procedure by which first to determine guilt and then punishment doubtless was not perceived. Perhaps imprisonment was viewed as an act of grace; perhaps it was felt that evidence on the guilt-innocence issue provided ample evidence as to punishment. Whatever the reason in 1867, it is apparent today that a new constitutional standard must be applied.

Today, largely because of the Fourteenth Amendment, our vision of the criminal trial is clearer. There is initially a need to determine whether the accused was responsible (in a physical, not a moral sense) for the death of the deceased. Only after this determination has been made adversely to the defendant, is it appropriate, indeed constitutional, to consider his punishment. The death penalty, once routine, is today exceptional. Evidence in mitigation ought constitutionally to relate to the full sweep of the defendant's personality and other relevant circumstances.

Yet how do we try a capital case before a jury? The guilt-innocence question is center-stage. Often the crime itself is horrible. The courtroom rings with detailed descriptions of the terrible scene. Graphic photographs may be in evidence. Pathologists may report in dry but telling terms of the damage to vital organs causing death.

If the defense contends that the accused was not responsible (again in a physical sense) for the death of the deceased his defense will be confined to his alibi or other defense. Throughout the trial it is unlikely that the jury will have learned anything meaningful about the defendant. True, if the defense admits physical responsibility for the death but claims, for example, that the crime was not murder but manslaughter, or that the defendant acted in self-defense, or that he was incapable of forming the requisite intent, or some other similar defense depending upon the defendant's state of mind, the jury may obtain some picture of the defendant as a human being. Absent this circumstance it is almost certain that the jury will retire knowing almost nothing of the defendant relevant to sentencing should they find him guilty. Indeed, if the defendant exercises his constitutional privilege not to testify, the jury may well never hear him speak a word during the course of the trial.

True, again, the defendant has a theoretical right to introduce evidence in mitigation. To do so where the defense is that he did not commit the crime, would surely undercut that defense so severely that it could scarcely be risked. No cautionary remarks from the Judge would overcome the enormous handicap to the defense. Who would believe a defendant who simultaneously declared his innocence and then asked a jury to show him mercy if it did not believe his assurance of innocence?

Nor is that all. The attorney for the defense is unable to make an effective plea for mercy because it too would undercut the defense and also because there is no, or at any rate, very little evidence in the record for mitigation. Even where there is a "state of mind" defense, e.g., that

the defendant reasonably acted in self-defense, it may be inconsistent to argue for mercy while simultaneously contending that there were reasonable grounds to believe, for example, that the deceased was about to make a deadly assault upon the defendant.

But the prosecutor suffers scarcely any limitations. A substantial portion of his case has been devoted to a minute examination of the crime. The murder itself cries out to the jurors. Perhaps he may not be able to introduce evidence solely for the purpose of showing aggravation but in many cases, perhaps most, such evidence will scarcely be needed because the crime itself effectively performs that task for the prosecutor.

Thus the jury retires to consider its verdict. On the question of guilt or innocence its focus is necessarily upon the crime where it properly belongs, but after reaching its verdict of guilt its focus remains upon the crime in determining punishment rather than shifting to the defendant and to the circumstances where it then belongs.

If these were all of the inequities endured by the defendant they would be heavy enough, but they are not. Even in a state such as Illinois which now permits a judge to accept or reject a jury's recommendation of death the defendant goes before the judge carrying the burden of such a recommendation, made in ignorance of the personality and life history of the defendant. Thus even in Illinois, where there is an opportunity to present evidence in mitigation to a judge, the defendant enters the battle for his life burdened with a constitutionally impermissible handicap. On appeal, the Supreme Court of Illinois has power to modify the sentence. (See Rule 615 (b) (4) of

the Rules of the Supreme Court of Illinois, which provide that on appeal the reviewing court may "reduce the punishment imposed by the trial court.") The power to mitigate, first enacted as Section 121-9 of the Code of Criminal Procedure of 1963, has not been exercised by the Supreme Court of Illinois in the six years that this provision has been part of Illinois law. (See Point II, pp. 14-20 below.) We cannot explain with certainty the reluctance of the Supreme Court to reduce sentences, but it may, at least in part, be because of the initial impetus to the death sentence provided by an uninformed jury. When the defendant comes before the Governor seeking commutation, having exhausted his judicial remedies, he again carries with him the burden of a jury recommendation, now fortified by sentence, and affirmance on appeal. (See further Point II, pp. 18-20 below.)

If the unitary trial had been forced upon us by special exigencies or as a compromise between conflicting values, or for some other rational cause, it would be a serious enough deprivation of constitutional rights. There are no such reasons. In fact, the remedy for this gross evil is plain and has already been adopted in a number of states. We need only confine the trial initially to the guilt-innocence question and ask the jury to rule upon it. If the jury finds the defendant guilty, the prosecution and defense can then introduce evidence in mitigation. It seems clear to us that the sole reason we do not now have such a procedure is because of the historical development outlined above. A practice originating prior to the 14th Amendment ought not to be retained when its evils are manifest, the remedy plain, and the practice contrary to due process.

The only grounds adduced by the court below for refusing to require splitting of the issues are insubstantial. The court below, 398 F. 2d at 186, relied upon its prior decision in *Pope* v. *U. S.*, 372 F. 2d 710, 727-730 (8th Cir. 1967). In *Pope*, the court held that a two stage trial was not constitutionally required. It should be noted that Pope admittedly shot three bank employees in the course of a robbery, 372 F. 2d at 712; hence the trial centered essentially about the question of criminal responsibility.

Separation of the issues of guilt-innocence and penalty is constitutionally necessary. Where we are concerned not with life or death but simply with money judgments in personal injury litigation, Civil Rule 21 of the United States District Court for the Northern District of Illinois provides that there may be separate trials of the liability and the damage issues. The damage issues may be tried before the same jury or another jury. What we do in personal injury litigation to achieve more exact justice, surely we must do as a matter of constitutional necessity when human life is at stake.

II.

Imposition of the death penalty in the absolute discretion of the jury, uncontrolled by standards or direction of any kind, violates due process.

The argument here was spelled out most persuasively in the separate opinion of Mr. Justice Tobriner in *In re Anderson*, 73 Cal. Reptr. 21 at 36, 40-59. We add only the following.

The Illinois statutes cited above, which are typical of those in other states, require explicit agreement of jury and court as a condition to imposition of death. Yet no standard is provided by which they can determine whether the death penalty is proper. As the Illinois Supreme Court stated in *People* v. *Bernette*, 30 Ill. 2d 359, 197 N. E. 2d 463 (1964): "The jury . . . was free to select or reject as it saw fit." *Id.* at 370.

Ill. Rev. Stat. ch. 38, sec. 1-7(g) (1967) does provide that the Court may hear evidence in mitigation before deciding if death is proper. Such evidence may concern the "moral character, life, family, occupation, and criminal record of the offender." But nowhere in this statute does a standard appear by which the jury or judge can assess these very vague "mitigating circumstances."

Illinois is not alone in allowing the jury unfettered discretion in deciding whether to impose the death penalty or not. All state legislatures which have not abolished the death penalty have left complete discretion in the jury.*

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* Ala. Code tit. 14, sec. 318 (1940); Ariz. Rev. Stat. sec. 13-453 (1956); Ark. Stat. Ann. secs. 41-2227, 43-2153 (1947); Cal. Pen. Code sec. 190 (1955); Colo. Rev. Stat. ch. 40, art. 2-3 (1963);

There are no explicit standards to guide the jury. As Kalven and Zeisel state: "The discretion which the jury in the United States is asked to exercise is, it should be emphasized, striking: there is neither rule nor standard to guide it . . . " "The American Jury and the Death Penalty," 33 U. Chi. L. Rev. 769, 770 (1966).

New York has limited capital punishment to murder of a police officer or prison guard, N. Y. Penal Code sec. 1045, but even as so limited the jury has complete discretion in deciding whether to impose the death penalty. Some states have classified murder by "degrees." But within the highest degree which is punishable by death the jury has no statutory or judicial standard by which it can guide itself; e.g., Ala. Code tit. 14, secs. 314, 318 (1940); Idaho Code secs. 18-4003, 18-4004 (1947); Ind. Stat. Ann. sec. 10-3401 (1956); Mo. Stat. Ann. sec. 559.030; Pa. Stat. Ann. tit. 18, sec. 4701 (Purdon 1963).

Conn. Stat. Ann. sec. 53-10 (1958); Dela. Code Ann. tit. 11, sec. 571 (1953); Fla. Stat. secs. 782.04, 919.23 (1951); Ga. Code Ann. sec. 26-1005 (1953); Idaho Code sec. 18-4004 (1947); Ill. Rev. Stat. ch. 38, secs. 9-1, 1-7(c)(1) (1967); Ind. Ann. Stat. secs. 10-3401, 9-1819 (Burns 1956); Kan. Stat. Ann. sec. 21-403 (1964); Ky. Rev. Stat. secs. 431.130, 435.010 (1948); La. Rev. Stat. tit. 14, sec. 30, tit. 15, sec. 409 (1950); Md. Ann. Stat. Art. 27, sec. 413 (1957); Miss. Code Ann. sec. 2217 (1942); Mo. Stat. Ann. sec. 559.030 (1949); Mont. Rev. Code Ann. sec. 94-2505 (1947); Neb. Rev. Stat. sec. 28-401 (1943); Nev. Rev. Stat. sec. 200.030 (1963); N. H. Rev. Stat. Ann. sec. 585:4 (1955); N. J. Stat. Ann. tit. 2A, ch. 113, sec. 4 (1953); N. M. Stat. Ann. ch. 40A, sec. 29-2 (1953); N. Y. Penal Code sec. 1045; N. C. Gen. Stat. sec. 14-17 (1953); Ohio Rev. Code tit. 29, sec. 2901.01 (1964); Okla. Stat. Ann. tit. 21, sec. 707 (1951); Pa. Stat. Ann. tit. 18, sec. 4701 (Purdon 1963); S. C. Code of Laws tit. 16, sec. 16-52 (1962); Tenn. Code Ann. sec. 39-2405 (1955); Tex. Pen. Code art. 1257 (1961); Wash. Rev. Code Ann. tit. 9, sec. 9.48.030 (1961); Wyo. Stat. Ann. sec. 6-54; Mass. Laws Ann. ch. 265, sec. 2 (1956); S. D. Code of 1939 (1960 Supp.) Ch. 13.20, sec. 13.2012 (1960); Utah Code Ann. tit. 76, sec. 76-30-4 (1953); Vt. Stat. Ann. tit. 13, sec. 2303 (1959).

It thus appears that the jury is given no statutory or judicial guides. What type of instructions must be given to the jury to guide them? There are no Illinois cases on this point but it seems well established by other courts that the trial court need only instruct the jury that it has discretion to decide what penalty should be imposed. Failure to so instruct would be reversible error. *Smith* v. *State,* 205 Ark. 1074, 172 S. W. 2d 248 (1943); *State* v. *Wilson,* 151 Iowa 698, 141 N. W. 337 (1913); *State* v. *Christensen,* 166 Kan. 152, 199 P. 2d 475 (1948); *Commonwealth* v. *Madaffer,* 291 Pa. 270, 139 Atl. 875 (1927); *Marshall* v. *State,* 33 Tex. 664 (1871); *Bradshaw* v. *Commonwealth,* 174 Va. 391, 4 S. E. 2d 752 (1939); *State* v. *Chaney,* 117 W. Va. 605, 186 S. E. 607 (1936). But telling the jury of its discretion is to do no more than repeat a statute which is itself standardless. It has in fact been held that merely reading or quoting the statute which grants discretion is sufficient. *Hernandez* v. *State,* 43 Ariz. 424, 32 P. 2d 18 (1934); *Howell* v. *State,* 102 Ohio 411, 131 N. E. 706 (1921).

Assuming that the jury finds the defendant guilty and imposes the death penalty, and assuming that the trial judge concurs, the Supreme Court of Illinois may, as we have noted, reduce the penalty under Rule 615. But this rule too provides no guidelines by which to judge the lower court's decision on the penalty.

The Illinois Supreme Court has taken a very limited view of its power under this provision. Prior to Rule 615 and its statutory predecessor, in *People* v. *Smith,* 14 Ill. 2d 95, 97, 150 N. E. 2d 815 (1958), the Court said that a reviewing court should not upset a sentence unless it *clearly appears* that the penalty constitutes a great departure

from the spirit of the law or that the penalty is *manifestly in excess* of the prescription of Sec. 2, Art. II of the Illinois Constitution which requires penalties to be proportioned to the nature of the offense.*

Subsequent to adoption of the statute allowing sentence reduction, the Court in *People* v. *Taylor,* 33 Ill. 2d 417, 211 N. E. 2d 673 (1965), admonished itself to proceed with caution and circumspection in reducing sentences. The trial judge, it observed, has superior opportunity to make a sound determination concerning the punishment to be imposed. In *People* v. *Bonner,* 37 Ill. 2d 553, 229 N. E. 2d 527 (1967), the Court stated that the imposition of sentence was a matter of judicial discretion, and in absence of *manifest abuse* of that discretion it will not be altered by reviewing court. Although these cases were non-capital cases, they demonstrate the reluctance of a reviewing court in Illinois to reduce the penalty imposed by the trial court even though reviewing courts are given that power by statute. A case in which the Court said it would not reduce the death penalty is *People* v. *Meyers,* 35 Ill. 2d 311, 220 N. E. 2d 297 (1966) *cert. den.* 87 S. Ct. 752, 385 U. S. 1019, 17 L. Ed. 2d 557. The Court characterized the crime as "brutal" and "atrocious".

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* *People* v. *Dukes,* 12 Ill. 2d 334, 146 N. E. 2d 14 (1957) was a capital case. The Court said that where the charge is murder, a jury has wide discretion in fixing the punishment. It added that when the jury in the exercise of that discretion inflicts the death penalty, it could not affirm the judgment even though proof of guilt is clear, if prejudicial error occurred in the trial. This seems to give the defendant some protection; but it is protection only from the possibility that the jury may have decided to impose the death penalty because of the prejudicial error. If there were no prejudicial error, the court would defer to the "wide discretion" of the jury and would not change the penalty.

Every murder is "brutal and atrocious." Our concern should be not with the crime, but with the criminal. Lacking standards to turn to, the Court looked to the deed, rather than to the doer. The case demonstrates the evil of a path unilluminated by statutory guides.

The absence of standards continues to affect the defendant even when he seeks executive clemency. There too clemency may be granted or withheld without statutory or constitutional guide.

Article 5, sec. 13 of the Constitution of Illinois provides:

> "The governor shall have power to grant reprieves, commutations and pardons, after conviction, for all offenses, subject to such regulations as may be provided by law relative to the manner of applying therefor."

Several Illinois cases have considered the Governor's power of commutation. In *People* v. *Jenkins*, 325 Ill. 372, 156 N. E. 290 (1927), the court held, "[t]he only restriction which the Legislature may impose on the Governor's power refers to the regulations relative to the manner of applying for reprieves, commutations, and pardons, and the act on that subject does not purport to and does not, restrict the Governor's authority except to that extent." 325 Ill. at 375, 156 N. E. at 291.

The exclusive discretion of the Governor in matters of commutation, without judicial review or legislative control, is practically a universal rule. With only one exception,*

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* In *McGee* v. *Arizona State Board of Pardons and Paroles*, 92 Ariz. 317, 376 P. 2d 779 (1962), the Arizona Supreme Court held that a condemned defendant had a right to, and compelled the board to grant, a full due process hearing despite the absence of

those courts which have been presented with the issue have held that the actions of the clemency authority are not within the purview of due process, and are not subject to challenge in the courts. *Executive Clemency in Capital Cases*, 39 N. Y. U. Law R. 136, 178 (1964). The Supreme Court of Oregon, in *Ducret* v. *Holmes*, 215 Ore. 121, 333 P. 2d 741, 744 (1958), held:

> "Where the constitution thus confers unlimited power on the Governor to grant reprieves, commutations and pardons, his discretion cannot be controlled by judicial decision. The courts have no authority to inquire into the reasons or motives which actuate the Governor in exercising the power, nor can they decline to give effect to a pardon for an abuse of power."

As authorities for this general proposition, the Oregon court cited: *In re Opinion of Justices*, 120 Mass. 600 (1876); *State* v. *Harrison*, 122 S. C. 523, 115 S. E. 746 (1923); *Martin* v. *State*, 21 Tex. App. 1, 17 S. W. 430 (1886); *People ex rel. Page* v. *Brophy*, 248 App. Div. 309, 289 N. Y. S. 362 (1936); *Ex parte Grossman*, 267 U. S. 87 (1924); *Jamison* v. *Flannin*, 116 Kan. 624, 228 P. 82 (1924); *Montgomery* v. *Cleveland*, 134 Miss. 132, 98 So. 111 (1923); 16 C. J. S. Const. Law sec. 157, p. 830.

Although the author of *Executive Clemency in Capital Cases*, 39 N. Y. U. Law Rev. 136, 159-177 (1964), found

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any constitutional, statutory, or regulatory provision for a hearing. Under the court's construction, the defendant would have to be provided with notice, an opportunity to be heard, an opportunity to present witnesses, and an opportunity to present evidence mitigating circumstances. The court held due process required this result, but nowhere specified whether the federal Constitution or the state constitution was the source of this right.

that clemency authorities sometimes referred to such "standards" as the nature of the crime, fairness of the trial, mitigating circumstances, doubt as to guilt, mental and physical condition of defendant, recommendations of prosecutor and trial judge, and political pressure and publicity, it is plain that these "standards" still cannot be reviewed by a court or be imposed by the legislature.

The totally unfettered discretion given to the Governor, although tending to eliminate some of the harshness of capital punishment, has thus resulted in the creation of a system with no standards.

Amici do not argue that the Governor should be limited in exercising his power of communication. Since he is the last resort open to one sentenced to death, he should have the widest possible discretion in making such a decision. We call attention to this point to emphasize that a man may go to his death and yet at no place in the elaborate judicial and executive machinery is there a legislative or case law standard set for judging who shall live and who shall die. Such situation is repugnant to due process.

CONCLUSION

What this court said in *Witherspoon* v. *Illinois* respecting a "hanging jury" applies with equal force to the issues of dividing the guilt-innocence and penalty determinations, and the issue of lack of legislative and case law standards:

> "The State . . . has stacked the deck against the petitioner. To execute this death sentence would deprive him of his life without due process of law." 391 U. S. at 510, 521.

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In the Supreme Court

OF THE

United States

OCTOBER TERM, [redacted] 1969

No. [redacted] 13

WILLIAM L. MAXWELL,

Petitioner,

vs.

O. E. BISHOP, Superintendent of Arkansas State Penitentiary,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR THE PEOPLE OF THE STATE OF CALIFORNIA AMICUS CURIAE IN SUPPORT OF RESPONDENT

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1968

No. 622

WILLIAM L. MAXWELL,
Petitioner,
vs.
O. E. BISHOP, Superintendent of Arkansas State Penitentiary,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR THE PEOPLE OF THE STATE OF CALIFORNIA AMICUS CURIAE IN SUPPORT OF RESPONDENT

INTEREST OF AMICUS CURIAE

The interest of the People of the State of California is limited to the first question set forth in the order granting writ of certiorari, which reads as follows:

> "1. Whether Arkansas' practice of permitting the trial jury absolute discretion, uncontrolled by standards or directions of any kind, to impose the death penalty violates the Due Process Clause of the Fourteenth Amendment?"

Amicus curiae has no interest in the disposition of the second question relating to the constitutionality of the procedure whereby issues of guilt and penalty are determined at a single hearing and upon a single verdict. California does not employ this procedure, but rather utilizes a two-stage trial with the issues of guilt and penualty being determined in separate proceedings. Cal. Pen. Code § 190.1.

We do, however, have a substantial interest in the first question. California, like Arkansas, gives no standards to juries to bind them in the determination of whether to impose the sentence of death or life imprisonment upon a defendant convicted of first-degree murder. But California does have certain important safeguards against arbitrariness in the sentencing process which may or may not be present in Arkansas. Furthermore, petitioner has vigorously alleged the existence of racial discrimination in the capital sentencing process of Arkansas, and has used this as a demonstration of alleged abuse of this sentencing process attributable in part to the lack of standards binding the jury. Whether or not this claim is valid, no possible claim of racial discrimination in capital sentencing in California has been or could be made. We fully support respondent in regard to the general proposition that a legislative scheme of capital sentencing which refuses to impose strictures upon the discretion of the sentencer, be it judge or jury, denies no constitutional right whatever.

The sole common feature of the California and Arkansas procedures is the absence of standards re-

stricting the discretion of a jury in a capital case in determining whether to spare the life of the defendant. We believe that a sentencing procedure without such standards is constitutional and is in fact an ameliorative procedure which has the effect of minimizing the number of death sentence verdicts actually returned.

It is the desire to uphold the validity of our California practice that brings The People of the State of California before this Honorable Court as amicus curiae.

SUMMARY OF ARGUMENT

In asking this Court to strike down as unconstitutional any procedure for capital sentencing which does not provide standards to minimize the discretion of jurors or judges in performing their sentencing function, petitioner makes a complex, highly theoretical argument, which entirely ignores the practical consequences that should be uppermost in the mind of this Court in determining whether due process and equal protection require the limitation of discretion in the capital sentencing procedure. His argument has never been accepted by any court.

Our basic proposition is a simple one: penalty trials conducted without standards deny neither due process nor equal protection and as a practical matter result in far fewer death sentences than would trials conducted with any reasonable set of standards. Death is the *de jure* or *de facto* presumptive penalty for first

degree murder and other capital offenses. The effect of the standardless penalty trial is to give the jury (and in California, the judge as well) free rein to grant mercy. The imposition of fixed and limited standards would tend to stifle the impulse to dispense mercy by at once diminishing each juror's individual responsibility to make a choice between life or death according to his conscience, and by forcing him to justify, to himself and his fellow jurors, upon some unknown grounds, his compassionate inclination to spare life.

This case comes up from a jurisdiction which employs an unusual sentencing procedure. In Arkansas, if petitioner is correct in his reading of the law of that state, a jury and only a jury makes this sole, unreviewable judicial decision between life and death in a capital case. It is thus claimed that the standardless penalty trial invites the jury to act arbitrarily, that the single-verdict procedure deprives the jury of factual information it needs to act rationally, and that the absence of judicial review or even meaningful judicial participation in the sentencing process provides no safeguard against arbitrariness. Without conceding the validity of any of these arguments, we wish to note that the California procedure is radically different and clearly distinguishable. In California, a penalty jury may be waived. The trial judge has the duty to review any death sentence recommended by a jury and to pass such a sentence only if, in his independent judgment, it is justified. Furthermore, the California Supreme Court, while lacking the formal power to reduce a death sentence, retains a very large measure

of control over the sentencing process by means of its power to reverse, solely as to punishment, judgments of death on the basis of errors that would be insignificant in the guilt phase. Furthermore, California employs a two-stage trial which, though we do not in any way concede is constitutionally required, does ensure that all evidence relevant to punishment (except that which the California Supreme Court has held the People may not present) is presented to the jury, and at no cost to the defendant's privilege against self-incrimination.

We will leave to respondent the task of rebutting any inference of racial discrimination in the imposition of the death sentence for rape in Arkansas which may arise from the statistics gathered by petitioners, but we submit that if such discrimination is proved, no connection has been established between it and the lack of standards in capital sentencing. It seems most unlikely that juries determined to discriminate on racial grounds will be deterred by any abstract standards which the judge may give them.

PRELIMINARY STATEMENT

Before proceeding to our argument, we feel obliged to call to the attention of the Court that there is reasonable ground to believe that no case or controversy actually exists in this matter. The only issues embraced by the grant of certiorari in this case (see Appendix, p. 76) concern the validity of petitioner's death sentence, and not the validity of his conviction. If he is

entitled to have his death sentence set aside upon other grounds, he would appear to have no business asserting before this Court the contentions which he has made.

Since the jury in petitioner's case imposed the death sentence upon him on June [illegible] before the decision of this Court in *Witherspoon v. Illinois*, 391 U. S. 510 (1968), there is a substantial possibility, and perhaps a probability, that the jury which imposed the death sentence was constituted in violation of the principles laid down in that case, which are fully retroactive. If such is the case, petitioner would be entitled to have his death sentence set aside, on *Witherspoon* grounds, upon application to any court of competent jurisdiction. In their documents before this Court, petitioner's counsel have not even alluded to the possibility of *Witherspoon* error.

Petitioner's silence on this point is understandable. By securing the *Witherspoon* issue in any collateral proceeding, he would obtain a "free ride" on the instant case. Since it is here in this Court, he would still be entitled to relief under *Witherspoon*. In the view here, his counsel will have obtained a ruling of great value to them in their unfortunate judicial attack upon the death penalty.

Under the circumstances, we suggest that the question of whether *Witherspoon* error is present in the record of petitioner's trial is a proper subject of inquiry by the Court in the instant case. We therefore have access to the trial transcript and we note that the two jurors who voiced the possibility of *Witherspoon* error that

ARGUMENT

I

A LEGISLATIVE OMISSION NOT TO REJECT BY THE IMPOSITION OF STANDARDS THE POWER OF JURIES TO SPARE THE LIVES OF PERSONS CONVICTED OF CAPITAL CRIMES DENIES NEITHER DUE PROCESS NOR EQUAL PROTECTION

> "The discretion conferred upon the penalty jury is similar to that conferred upon the trial court to punish certain crimes as either felonies or misdemeanors. Many sections of the Penal Code vest in the trial court discretion to sentence defendants convicted of crimes to state prison or to jail without mention of standards for the exercise of that discretion. [Citation] Such sections have been held not to violate due process or equal protection." *Id.* at 651, 447 P.2d at 126, 73 Cal. Rptr. at 30.

Indeed, the broadening of discretion in the matter of sentencing has been noted as one of the progressive developments in the criminal law in the past half century. Thus, provisions for indeterminate prison sentences, the power of a trial court to reduce a felony offense to a misdemeanor, and to grant probation in an expanded number of cases, have appeared along with the substitution of an unlimited power of a jury to grant a life sentence in a capital case for the prior practice of an automatic death sentence upon the return of a verdict of guilty. Moreover, the broadening of sentencing discretion generally and in capital cases particularly has accompanied and in no way has been inconsistent with the broadening of constitutional protections for criminal defendants. We submit that the argument advanced by petitioner's counsel exalts theory over practicality, and ignores history.

This Court has never shut its eyes to the practical consequences of its far-reaching decisions. Notably, this Court has shaped its retroactivity doctrines with an eye to minimizing the negative practical conse-

quences to the state of applying retrospectively a newly announced doctrine. See *Stovall v. Denno*, 388 U.S. 293 (1967); *Johnson v. New Jersey*, 384 U.S. 719 (1966); *Tehan v. Shott*, 382 U.S. 406 (1966); *Linkletter v. Walker*, 381 U.S. 618 (1965). When this Court considers adoption of a new constitutional ruling which deals exclusively with matters of life and death, the probable practical results of the doctrine must be examined with the greatest care.

In support of the argument that standardless trials work in favor of the defendant, we begin with the proposition that death is the presumptive penalty for capital offenses, usually murder in those English speaking jurisdictions which retain capital punishment. It is not the preferred penalty in the sense of being more frequently imposed than life imprisonment, for petitioner correctly notes that it is everywhere imposed in only a minority of capital cases. It is, however, the presumptive penalty, in law, in fact, or in both. In some states the Legislature has expressed a preference for the death penalty over its alternative of life imprisonment. In others, such as California, the Legislature has remained neutral as between the two alternatives. See Cal. Pen. Code § 190.1. But to hold that a standardless proceeding is constitutional in the former jurisdictions but not in the latter would be to exalt form over substance. *In re Anderson, supra*, 69 A.C. 638, 650, 447 P.2d 117, 125, 73 Cal.Rptr. 21, 29 (1968). But whatever the legislative prescription, it is undeniable that in the minds and hearts of the lay juryman, death is the presumptive

penalty for murder. In our cultural heritage, from the Old Testament, through the English common law, modern crime fiction and motion pictures, through the daily news media reports of "A Man on Trial for His Life," the penalty for murder is death. The principle that wilful and deliberate killing is followed by the noose is inextricably a part of our collective consciousness. The juror thus brings with him to the jury box the expectation that death will ordinarily follow upon a finding of guilty.

Why, then, is the death sentence imposed with comparative rarity? The answer is that no jury lightly assumes the responsibility of ordering a man's death. The question confronting a jury which has found an accused guilty of a capital crime is therefore not, "Shall we kill him?" but "Shall we spare him?" Legislation which omits standards for the jury's determination amounts to an affirmation that the jury should be in no way impeded in answering that question in the affirmative.

In voting to spare the life of a defendant convicted of a capital crime, the jury is acting upon its feelings of charity, benevolence, sympathy, pity, empathy, and humanity. See A. Koestler, *Reflections on Hanging*, 166-167 (1956). These emotions are highly valued in every civilized culture, but they are, in the best sense of the word, non-rational. This Court has put the matter somewhat differently, but quite aptly:

> "The authority of the jury to decide that the accused shall not be punished capitally is not limited to cases in which the court, or the jury, is of

> opinion that they are palliating or mitigating circumstances. But it extends to every case in which, upon a view of the whole evidence, the jury is of the opinion that it would not be wise or just to impose capital punishment. How far considerations of age, sex, ignorance, illness, or intoxication, of human passion or weakness, of sympathy or clemency, or the irrevocableness of an executed sentence of death, or an apprehension that explanatory facts may exist which have not been brought to light, or any other consideration whatever, should be allowed weight in deciding the question whether the accused should or should not be capitally punished, is committed by the act of Congress to the sound discretion of the jury, and of the jury alone." *Winston v. United States*, 172 U.S. 303, 312-313 (1899).

That any reasonable system of standards would indeed result in more death sentences than the current standardless procedure is a proposition which, though of necessity in part theoretical, can hardly be doubted. The only conceivable type of standards which legislatures could enact would necessarily revolve around aggravating and mitigating circumstances. The legislature might simply identify and enumerate such circumstances, provide for their being read to the jury, and leave the matter in the jury's sole discretion. It would, of course, be totally illogical for this Court to impose on the states, as a matter of constitutional law, the requirement that juries be instructed in terms of standards which they would be entirely free to disregard.

In any event such a formulation of standards, being essentially advisory, could be of no substantial benefit to convicted defendants. The jury would remain totally free to disregard the list of aggravating and mitigating circumstances. And the amount of harm to a defendant that such a formulation of standards could work is enormous. Indeed, the very enumeration of aggravating and mitigating circumstances would tend strongly to impel the jury to impose the death sentence wherever the case showed one or more aggravating circumstances and no mitigating circumstances. The jury's natural predisposition to spare life can be diminished by pointing to a set of prescribed standards for leniency and citing the defendant's failure to meet those standards as justification for refusing to spare him.

The second major type of standards that could be derived would similarly enumerate aggravating and mitigating circumstances but would require that one or more of the aggravating circumstances and none or fewer than all of the mitigating circumstances be present in order to justify imposition of the death penalty. We would insist that the question of what crimes warrant the death penalty is essentially a decision for the elected representatives of the people. See concurring opinion of Mosk, J., in *In re Anderson*, *supra*, 69 Ac ctis; ons, 447 P.2d 117, 131-132, 74 Cal.Rptr. 21, 35-36. Moreover, this Court should properly, at least in this case, require legislatures to enact such "binding" standards. Such standards would effectively narrow the range of crime for which the

death penalty may be imposed. This Court could not hold that such narrowing must take place unless it first held that the death penalty could not be constitutionally imposed for any certain capital offense. That question is, of course, not before this Court in this case, and we submit that it has no place in the instant proceeding.

Indeed, counsel have not suggested any specific limiting principles that would give rise to binding standards. The only set of standards ever formally devised, to our knowledge, is found in Model Code § 210.6 (Proposed Official Draft 1962). This section enumerates certain aggravating and mitigating circumstances and provides that a death sentence may be imposed only if one of the aggravating circumstances is found and there are no mitigating circumstances sufficiently substantial to call for leniency. These aggravating circumstances are:

> "(a) The murder was committed by a convict under sentence of imprisonment.
>
> "(b) The defendant was previously convicted of another murder or of a felony involving the use or threat of violence to the person.
>
> "(c) At the time the murder was committed the defendant also committed another murder.
>
> "(d) The defendant knowingly created a great risk of death to many persons.
>
> "(e) The murder was committed while the defendant was engaged or was an accomplice in the commission of, or an attempt to commit, or flight after committing or attempting to commit robbery, rape or deviate sexual intercourse by

force or threat of force, arson, burglary or kidnaping.

"(f) The murder was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from lawful custody.

"(g) The murder was committed for pecuniary gain.

"(h) The murder was especially heinous, atrocious or cruel, manifesting exceptional depravity."

The foregoing list of aggravating circumstances is difficult to quarrel with, and would probably command a rough consensus among those who favor the death penalty as to what may properly be considered aggravating. It is worth noting that in each of the last twenty-two cases reviewed by the California Supreme Court (which reviews all death sentences imposed in California) in which a sentence of death was imposed for first-degree murder, one or more of the aggravating circumstances enumerated in the Model Penal Code were present.[1] We have no way of knowing, of

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[1] *People v. Durham*, 70 A.C. 179, ___ P.2d ___, ___ Cal.Rptr. ___ (1969) (forcible resistance to arrest); *People v. Anderson*, 70 A.C. 58, 447 P.2d 956, 73 Cal.Rptr. 550 (1968) (exceptional heinousness and depravity—60 stab wounds in body of victim, a ten-year-old girl); *People v. Beivelman*, 70 A.C. 37, 447 P.2d 913, 73 Cal.Rptr. 521 (1968) (robbery); *People v. Risenhoover*, 70 A.C. 15, 447 P.2d 925, 73 Cal.Rptr. 533 (1968) (kidnaping); *People v. White*, 69 A.C. 781, 446 P.2d 993, 72 Cal.Rptr. 873 (1968) (burglary, robbery, and rape); *People v. McDowell*, 69 A.C. 766, 447 P.2d 97, 73 Cal.Rptr. 1 (1968) (robbery); *People v. Bassett*, 69 A.C. 121, 443 P.2d 777, 70 Cal.Rptr. 193 (1968) (double murder); *People v. Lara*, 67 Cal. 2d 365, 432 P.2d 202, 62 Cal.Rptr. 586 (1967) (kidnaping); *People v. Jackson*, 67 Cal.2d 96, 429 P.2d 600, 60 Cal.Rptr. 248 (1967) facts reported at 59 Cal.2d 375, 379 P.2d 937, 29 Cal.Rptr. 505 (1963) (rape; prior convictions of crimes of violence); *People*

course, in how many cases the jury, notwithstanding the presence of aggravating circumstances, spared the defendant's life for no reason other than the desire to dispense mercy.

An additional problem with any attempt to formulate standards is that any list of mitigating circumstances must necessarily be exclusive; it cannot hope to foresee and provide for all the possible mitigating circumstances that could arise in the context of a given case. Under the present standardless system, the defendant's attorney is able to seize upon any circumstance and argue that it is mitigating, without being forced to attempt to bring himself within a prescribed list.

It is worth noting that in California the standardless penalty trial has evolved through a series of court decisions all of which, at the insistence of defendants

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v. Powell, 67 Cal.2d 32, 429 P.2d 137, 59 Cal.Rptr. 817 (1967) (kidnaping); *People v. Massie*, 66 Cal.2d 899, 428 P.2d 869, 59 Cal.Rptr. 733 (1967) (robbery); *People v. Varnum*, 66 Cal.2d 808, 427 P.2d 772, 59 Cal.Rptr. 108 (1967) (robbery, kidnaping); *People v. Wilson*, 66 Cal.2d 749, 427 P.2d 820, 59 Cal.Rptr. 156 (1967) (double murder, possibly in the course of perpetrating a burglary); *People v. Modesto*, 66 Cal.2d 695, 427 P.2d 788, 59 Cal. Rptr. 124 (1967) (double murder, possibly in the course of perpetrating rape and burglary; prior murder conviction); *People v. Hill*, 66 Cal.2d 536, 426 P.2d 908, 58 Cal.Rptr. 340 (1967) (robbery); *People v. Pennington*, 66 Cal.2d 508, 426 P.2d 942, 58 Cal. Rptr. 374 (1967) (kidnaping, rape, as indicated at 66 Cal.2d 511 n. 1); *People v. Bandhauer*, 66 Cal.2d 524, 426 P.2d 900, 58 Cal. Rptr. 332 (1967) (robbery); *People v. Gonzales*, 66 Cal.2d 482, 426 P.2d 929, 58 Cal.Rptr. 361 (1967) (robbery); *People v. Griffin*, 66 Cal.2d 459, 426 P.2d 507, 58 Cal.Rptr. 107 (1967) (rape); *People v. Hines*, 66 Cal.2d 348, 425 P.2d 557, 57 Cal.Rptr. 757 (1967) (robbery); *People v. Lookadoo*, 66 Cal.2d 307, 425 P.2d 208, 57 Cal.Rptr. 608 (1967) (robbery); *People v. Spencer*, 66 Cal.2d 158, 424 P.2d 715, 57 Cal.Rptr. 163 (1967) (robbery, kidnaping).

and for their benefit, removed from the jury's consideration standards found inimical to defendant's interest. *People v. Green*, 47 Cal. 209, 302 P.2d 307 (1956), overruled the line of cases upholding the propriety of instructing the jury that it should bring in the death penalty unless it found mitigating circumstances. In *People v. Love*, 56 Cal.2d 720, 366 P.2d 33, 809 (1961), prosecutors were forbidden to argue to the jury that the death penalty is a deterrent to crime. *People v. Morse*, 60 Cal.2d 631, 388 P.2d 33, 36 Cal.Rptr. 201 (1964), held that neither by instruction nor evidence could the jury be informed that a person convicted of first degree murder and sentenced to life imprisonment could be paroled within seven years. The experience of the California courts thus tends strongly to bear out the proposition that standards can only result in more death sentences.

The argument for the constitutionality of standardless penalty trial has gained strength from the decision of this Court in *Witherspoon v. Illinois*, 391 U.S. 510 (1968), where this Court narrowed the grounds for exclusion of potential jurors in capital cases in the interest of making the jury as representative as possible of the conscience and values of the community by ensuring that people opposed to the death penalty will not be excluded from juries unless their bias is so pervasive as utterly to preclude their voting for the death penalty. The Court has declared that "a jury that must choose between life imprisonment and capital punishment can do little more *and must do nothing less* than express the conscience of the community on the question of life or death." *Id.* at

519. (Emphasis added.) The grant of discretion to a sentencing jury gives the conscience of the community the fullest application in any given case. Thus in arguing against full discretion, petitioner's counsel are in reality stating that the conscience of the community should not be brought fully to bear on the question of sentence. If a penalty jury were required to apply prescribed standards, then by the authority of *Witherspoon* each side would be able to exclude for cause those jurors who, though they would not automatically vote against a death sentence, stated that they were in disagreement with the standards and would refuse to apply them. The resulting jury would thereby be less representative of the community than was envisioned by the *Witherspoon* decision.

Petitioner asserts that the standardless penalty proceeding denies regularity and equality. This is not correct. As was stated in *In re Anderson*, *supra*, 69 A.C. 638, 651, 447 P.2d 117, 127-128, 73 Cal.Rptr. 21, 31-32, equal protection is afforded because every person has the same chance for lenience as well as the same possibility of receiving the maximum penalty. Thus there is nothing discriminatory in the procedure.

Petitioner in effect demands that all capital defendants be equally deprived of the beneficent effects of a jury's unrestrained pity, sympathy, and other merciful inclinations. The principle of equality in capital sentencing may be intellectually satisfying, but we cannot believe that the Constitution requires jurisdictions retaining capital punishment to return to a sen-

> and state legislatures from effectuating a substantive end not constitutionally denied them, by whatever permissible means those bodies consider most appropriate." Note, 109 U. Pa. L. Rev. 67, 89 (1960).

In this case, the national and state legislatures have desired to effectuate the substantive end of minimizing the actual incidence of the death penalty through allowing juries free rein to exercise mercy rather than to adhere to the demands of strict justice. It is inconceivable that this end would be constitutionally denied the legislatures, and for that reason, the standardless penalty trial is immune from the vagueness attack.

In addition, a ready answer has been provided to petitioner's contention that the *ad hoc* judgments necessarily made by juries in capital sentencing are *per se* unconstitutional:

> "[I]nto the process of weighing . . . considerations [bearing upon vagueness] there enters that principle which is always a force in the Court's deliberations, precisely because the Court is charged with the preservation, in balance, of a complex lot of social and individual values: the principle of necessity. The maintenance of order is the precondition of any freedom in a society, and where the subject matter of regulation is such as to make unfeasible modes of law administration other than those which involve *ad hoc* judgments, considerable pressures are created in favor of permitting an *ad hoc* judgment scheme." *Id.* at 95.

Furthermore the sentencing function is no less particularized, *i.e.*, *ad hoc*, when carried out by a judge

in any criminal case. Both jury sentencing in a capital case and sentencing by a judge are similar in that the Legislature has prescribed the punishments available; in both it has authorized a specified body to make a choice within legally prescribed limits. A defendant's potential for rehabilitation is only one of a number of factors that a judge considers in determining what sentence to impose. He must also consider the community's needs for protection. No specific standard controls the exercise of a trial judge's discretion and no court has ever intimated, let alone held, that the defendant's rights are thereby violated. *In re Anderson*, 69 A.C. 638, 652, 447 P.2d 117, 126-127, 73 Cal.Rptr. 21, 30-31.

In concluding this argument, we direct the attention of the Court to the conclusions of the body which has made the most authoritative and exhaustive study to date of capital punishment:

> "There are strong reasons for believing that it must inevitably be found impracticable to define a class of murders in which alone the infliction of the death penalty is appropriate. The crux of the matter is that any legal definition must be expressed in terms of objective characteristics of the offense, whereas the choice of the appropriate penalty must be based on a much wider range of considerations, which cannot be defined but are essentially a matter for the exercise of discretion." Royal Commission on Capital Punishment, 1949-1959 Report 173.

II

IF THIS COURT SHOULD FIND THE STANDARDLESS PENALTY TRIAL UNCONSTITUTIONAL IN THE CONTEXT OF THE ARKANSAS PRACTICE, DISTINGUISHING FEATURES OF CALIFORNIA PROCEDURE WOULD WARRANT REFUSAL TO STRIKE DOWN THE CALIFORNIA PRACTICE

Not contenting himself with an attack on the standardless penalty determination *per se*, petitioner has made much of certain aspects of Arkansas procedure and practice which are alleged to render the standardless penalty determination unconstitutional as practiced in Arkansas. We disagree with this contention, but believe it proper to leave to respondent the task of answering it. For our part, we will content ourselves with pointing out that these peculiarities of Arkansas practice do not exist in California and for that matter, are probably not general throughout the nation. We suggest that the finding of unconstitutionalities of the Arkansas practice would not justify a similar finding as to the standardless penalty proceeding *per se*.

Petitioner alleges that in Arkansas only a jury may determine whether a person convicted of a capital crime is to suffer the death penalty, and that a jury verdict of death is totally immune from any form of judicial review. In California, by contrast, a jury trial on the issue of penalty may be waived (Cal. Pen. Code § 190.4). In any event, judicial review of a jury's death verdict is readily available.

> "In disposing of a defendant's motion for a new trial, the trial judge has the duty to review the evidence to determine whether in his independent

> judgment the weight of the evidence supports the jury's verdict, and if he decides it does not, he has the power to reduce the penalty to life imprisonment." *In re Anderson*, 69 A.C. 613, 618, 447 P.2d 117, 121, 73 Cal.Rptr. 21, 28 (1968).

This power of judicial review acts as an obvious shield against arbitrary jury action.

While the Supreme Court has no power as such to reduce the death sentence, *ibid.*, it retains a large measure of control over such sentences. On the one hand, the California Supreme Court reverses numerous death judgments only as to penalty by viewing as inherently prejudicial almost any error in the penalty phase of a trial, see *People v. Hines*, 61 Cal.2d 164, 390 P.2d 398, 37 Cal.Rptr. 622 (1964), while applying to the guilt phase the same standard of harmless error which applies in trials generally.

In addition to making a separate argument for the unconstitutionality of the "single verdict" procedure, petitioner states that, when combined with the standard penalty trial, it has the effect of virtually compelling the jury to act irrationally in its penalty determination, for want of relevant factual information concerning the defendant which he cannot present during a single guilt-penalty trial without sacrificing his privilege against self-incrimination. While we do not accept this argument, we note that California is one of the five states which employs a bifurcated trial, with guilt and penalty being determined in separate proceedings. At these proceedings evidence of the circumstances surrounding the crime, the defendant's

capital sentencing that may arise from the factual data compiled by petitioner. We do, however, make the observation that petitioner has succeeded in establishing no nexus whatsoever between the claimed racial discrimination and the lack of standards characterizing the procedure for determining penalty in capital cases. If Arkansas jurors are, as petitioner has suggested, bent on racial discrimination, there is no reason whatever to believe that they will be deterred in carrying out such discrimination by any instruction or combination of instructions which a judge may read to them.

But if it be assumed that petitioner has established such a nexus between the alleged racial discrimination and the standardless penalty trial as to show that the latter causes, contributes to, or in any way exacerbates the former, the answer is to confine the remedy to the particular problem. We believe we have demonstrated the overall ameliorative effects of a standardless penalty proceeding. Given these effects, the standardless proceeding should be retained insofar as possible, and abandoned only to the extent necessary to cure the possible substantive evil of racial discrimination. Perhaps the answer, then, is to require standards (and perhaps bifurcated trials as well) only in rape trials, where rape is capitally punishable. The restriction of a constitutional requirement of legislatively imposed standards for the guidance of juries in penalty determinations to rape trials would, if petitioner's hypothesis about the nexus between racial discrimination and standardless penalty trials is true,

have the effect of surgically going to the root of racial discrimination in capital sentencing without employing the meat-axe procedure of requiring standards in all death penalty determinations or of unwarrantedly denying the general power of states to impose capital punishment for rape.

CONCLUSION

This Court should uphold the sound practice of allowing juries in capital cases free rein to exercise their natural inclinations to spare the defendant, without imposing on them standards which would inevitably have the effect of inclining the jury toward imposing strict justice rather than granting mercy. In any event, this Court should make no broad holding that standardless penalty trials are unconstitutional, regardless of local variations and procedures which effectively guard against arbitrary jury action.

Dated, San Francisco, California,
February 19, 1969.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 13

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SUPREME COURT, U.S.

WILLIAM L. MAXWELL
Petitioner,

v.

O. E. BISHOP, SUPERINTENDENT OF ARKANSAS STATE PENITENTIARY
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHT CIRCUIT

BRIEF FOR RESPONDENT

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968
No. 622

WILLIAM L. MAXWELL,
Petitioner,

v.

O. E. BISHOP, SUPERINTENDENT OF ARKANSAS STATE PENITENTIARY
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHT CIRCUIT

BRIEF FOR RESPONDENT

ARGUMENT

INTRODUCTION

At the present time there are five offenses punishable by death in Arkansas: Kidnapping, Ark. Stat. Ann. §41-2304 (Repl. 1964), rape, Ark. Stat. Ann. §41-3403 (Repl. 1964), murder in the first degree, Ark. Stat. Ann.

§41-2227 (Repl. 1964), treason, Ark. Stat. Ann. §41-4102 (Repl. 1964), and burning of prisons by convicts, Ark. Stat. Ann. §41-502 (Repl. 1964). As originally enacted, these statutes provided automatically for the imposition of a death sentence. In 1915, however, Ark. Stat. Ann. §43-2153 (Repl. 1964) was enacted which gave the jury the alternative of imposing a sentence of life imprisonment or death upon finding one guilty of one of the above offenses.

With the possible exception of burning of prisons, it is submitted that the offenses now punishable by death in Arkansas are those that have been historically considered to be of a serious enough nature to warrant the harshest of punishments. Thus, we are not concerned with whether the offense now in issue is one for which the death penalty may be imposed.

Petitioner has cited many noted and eminent authorities for the proposition that the death penalty should be voided. While respondent certainly does not deny that there is a rather substantial movement under way to see that that goal is reached, respondent does not consider that this case involves the validity of the penalty, but rather only the validity of the procedural means used in imposing the penalty.

Respondent disagrees with petitioner that the question of discrimination in the imposition of the death penalty is now in issue. This point was extensively covered in petitioner's petition for certiorari, and the Court denied certiorari on this point. Nevertheless, the argument is raised anew on the theory that "where a state practice is challenged as conferring arbitrary and lawless power tending to abuse, in a manner forbidden by the Fourteenth Amendment, proof that the power has in fact been regu-

larly abused is entitled to considerable weight." (Petitioner's brief P. 5). The two lower federal courts found this "proof" legally insufficient and this Court denied the request for certiorari.

What this case really involves is whether the jury system is a workable procedure in capital cases. Petitioner contends that he would have no complaint to a jury's deciding the question of life or death if framed by adequate rules. But it is earnestly submitted by respondent, that a set of rules could never be drafted which would both protect the rights of the accused and the interest of the state.

I

Arkansas' practice of allowing capital trial juries absolute and arbitrary power to elect between the penalties of life or death for the crime of rape violates the rule of law basic to the due process clause.

A. *The Discretion Given Arkansas Juries.*

Turning first to the procedures followed in Arkansas in capital cases, Ark. Stat. Ann. §43-2153 (Repl. 1964) p. 1, supra, gives to the jury the sole discretion to impose a life or death sentence, and since Ark. Stat. Ann. §43-2108 (Repl. 1964) prohibits the waiving of a jury in a capital case, this decision is always made by a jury.

The penalty imposed by the jury will not be reduced unless the proof in the case fails to sustain the charge. *Nail* v. *State*, 231 Ark. 70, 328 S.W. 2d 836, 845 (1959). This, we submit, is by far the better policy, and is one that is not uncommon, particularly in the area of criminal law.

The basis for our assertion that this is the better policy is that the assessment of punishment, particularly in capital cases, is not only a legal question but a moral one as well. The Arkansas Legislature deems certain offenses to be so grave as to warrant the infliction of a death penalty. Until 1915, when Ark. Stat. Ann. 43-2153 (Repl. 1964) was passed, one found guilty of one of these offenses was automatically given the death penalty. Now, as noted above, the jury has a choice, and because it has a choice, something more than the guilt or innocence of the accused is in issue; the jury must decide whether the convicted will live or die. The Legislature did not undertake to decide which convicted rapist, for example, would live and which would die. And just as the Legislature did not attempt this determination, neither should the trial judge nor the Arkansas Supreme Court substitute its judgment for that of the jury.

The importance of this is twofold. First, the Arkansas Legislature deems the crime of rape to be of sufficient severity as to be punishable by death. Second, the Legislature logically recognized that under some circumstances those convicted of one of the offenses would be entitled to live. To state it another way, the Legislature recognized that the State had a sufficient enough interest in preventing these crimes and punishing those who committed them that it provided for punishment by death, but at the same time it saw that some circumstances operated to mitigate the crime, and thus it slackened the harsh rule of automatic death and allowed for a mitigation in punishment. Implicit in this point is the fact that the Legislature entrusted to the people of Arkansas the discretion of who would be sentenced to death and under what circumstances. Such procedure is not peculiar to the State of Arkansas. See *In re Anderson*,

Cal. 2d , 447 P. 2d 117, 73 Cal. Rptr. 21, 447 P. 2d 117 (1968); *In re Ernest's Petition*, 3 Cir., 294 F. 2d 556, Cert. Den., 368 U.S. 917, 82 S. Ct. 198, 7 L. Ed. 2d 132.

This attack on capital jury procedures is not novel. Most recently the California Supreme Court dealt with the problem in *In re Anderson, supra.* Justice Burke, writing for the majority, observed that "The Legislature, by entrusting to the absolute discretion of the jury the decision between life imprisonment and death has indicated its belief that jurors understand the factors that are relevant to such a decision." (447 P. 2d at p. 125). Respondent commends the same logic to the Court in this case.

Similarly, it was noted in *In re Ernest's Petition, supra,* that "it is a matter of legislative history in most jurisdictions, certainly in New Jersey, that the conferring of this power upon juries is potentially advantageous and, in no way hurtful to persons convicted of first degree murder, for the antecedent statutes rather generally made the death sentence mandatory in all such cases." (294 F. 2d at pp. 560-561).

Finally, the following statement is made in *State* v. *Latham*, 190 Kan. 411; 375 P. 2d 788 (1962) at page 797:

> "First, the sole power to provide for punishment of offenders belongs to the Legislature. It alone has the power to define offenses and affix punishments. Courts are empowered only to ascertain whether an offense has been committed, and if so to assess punishment, within the terms of the law, for its commission."

And further, at page 798 of 375 P. 2d:

> " . . . this court is neither authorized nor does it have any disposition to debate the question of

> the wisdom of capital punishment. The legislature determines the policy of the State in that regard and enacts statutes which the courts and other officials with respect thereto are bound to follow, which duties they are not privileged to ignore." See also *State* v. *White*, 60 Wash. 2d. 551, 374 P. 2d 942 (1962); *Johnson* v. *Commonwealth*, 208 Va. 481, 158 S.E. 2d 725 (1968); *Chatterton* v. *Dutton*, 223 Ga. 243, 154 S.E. 2d 213 (1967).

These authorities, we submit, stand for several propositions: First, the Arkansas procedure is not unique in American criminal procedure; second, it is within the power and authority of the Arkansas Legislature to provide for a death penalty; third, once the Legislature makes that decision, the courts cannot and should not substitute their judgment for that of the legislature or jury; fourth, and perhaps most importantly, it has never been thought that this procedure violates due process; "But even if it were practicable and desirable to have such a formula it does not follow that the Legislature's failure to provide one renders the sections unconstitutional." *In re Anderson, supra*, 447 P. 2d 125.

The cases of *Skinner* v. *Oklahoma*, 316 U.S. 535, 62 S. Ct. 1110, 86 L. Ed. 1655, and *Giaccio* v. *State of Pennsylvania*, 382 U.S. 399, 86 S. Ct. 518, 15 L. Ed. 2d 447, do not compel a holding that the Arkansas procedure is unconstitutional. The Skinner argument was also made in *In re Anderson, supra*, and the Court summarily dismissed it with the assertion that the California statutes in question "do not contain an unconstitutional classification, and since under like circumstances every person convicted of first degree murder has the same chance for leniency as well as the same possibility of receiving the maximum sentence, there is nothing discriminatory in the sections." (447 P. 2d 127-128).

The *Giaccio* argument was also raised by petitioner in his appeal to the Court of Appeals for the Eighth Circuit. *Maxwell* v. *Bishop*, 8 Cir., 398 F. 2d 138, 149-150. In rebutting this contention, Judge Blackmun stated:

> "There is no question as to what is prohibited under the Arkansas rape statute. And the secondary argument in *Giaccio* is a far cry from that Arkansas statute. Of particular import is the court's footnote 8, p. 405 of 382 U.S., to the effect that in reaching its conclusion that the Pennsylvania statute was invalid, "we intend to cast no doubt whatever on the constitutionality of the settled practice of many states to leave to juries finding defendants guilty of a crime the power to fix punishment within legally prescribed limits." Mr. Justice Stewart, in concurring, p. 405, felt that, despite this disclaimer, much of the reasoning in the opinion served to cast doubt "upon the settled practice of many States to leave to the unguided discretion of a jury the nature and degree of punishment to be imposed upon a person convicted of a criminal offense." No other Justice joined him in that observation. We have no alternative, therefore, except to conclude that footnote 8 means what it says and that the Court did not, by its decision in *Giaccio*, cast doubt upon the constitutionality of a state practice which leaves to juries the power to fix punishment within legally prescribed limits. This thought was specifically applied later in a capital case by the majority opinion in *Spencer* v. *Texas*, 385 U.S. 554, 560 (1967). We are not impressed with the defense characterization of footnote 8 as only a "careful reservation of a question" and referable "to jury sentencing generally, not capital sentencing."

See also *In re Anderson*, *supra* 447 P. 2d 127; *Johnson* v. *Commonwealth*, *supra*, 158 S.E. 2d 730.

B. *The Role of the Jury and the Standards Argument.*

As was noted earlier, one of the basic points of this case is whether the jury system is a practicable procedure in capital cases. Time and again petitioner refers to the arbitrary and unfettered discretion possessed by capital juries in Arkansas, which, of course, it is asserted, is the reason for the great need for "standards" to guide juries in determining who should live and who should die, as though jurors were some type of computer that had to be properly programmed in order to reach the correct result.

One of the greatest fallacies we see in the standards argument is that it overlooks the very foundation of the jury system. Jurors are the conscience of the community, and they, through the everyday experiences of life, know what type of conduct is so reprehensible as to require the infliction of some type of punishment, whether the case be one of murder or simple larceny; *In re Anderson, supra*, 447 P. 2d at p. 125; and it is submitted that to have a judge read to a jury a list of vague and indefinite "do's" and "don'ts," and they must of necessity be vague and indefinite, will in no way aid a jury in making its decision. If the standards do not comport with the conscience of the community, the jury will not abide by them, and if they do comport, the jury will take the standards into consideration anyway.

A good example of this point is petitioner's attempt to distinguish capital cases from those involving the "reasonable man" test. Petitioner admits the "reasonable man" test is imprecise, but yet he recognizes it as a standard. But that which is reasonable to one will not be reasonable to another, depending on the experience

each has had. The fact that each has been told to use a "reasonable man" test still leaves the matter totally with the individual juror, and the defendant can only hope that the jurors' ideas of what a reasonable man would have done favor him. And so it must be with standards in a capital case; whatever the standards are they must leave the decision to the individual juror, otherwise the standards will no longer be a guide to the juror but rather a leash to lead him to a specified result regardless of the dictates of his conscience.

This, we submit, is precisely what petitioner is seeking here. He attacks in his brief the discretion given capital juries for the following reasons: "But a death-sentencing jury need find no facts, either of a specific sort . . . or of a more general sort." (P.38); "Nor is there any legal prescription, to guide the jury or enable review of its judgment, of any *preclusive* factual findings . . . " (P.39); "Nor is the jury required to consider, or to take account of, any specified facts or concerns." (P.39); "Nor is there any enumeration, for the jurors', of specified facts or concerns which they *may* consider." (P.39); "Nor is there enumeration and proscription of *im*permissible considerations." (P.39). In short, petitioner wants the jury to be told that if they find X, Y and Z, then, despite the guilt of the defendant, he cannot be sentenced to death. He does not seek standards to *guide* the jury; he wants hard-and-fast rules that *tell* the jury how to decide the case, which in essence takes the decision away from the jury and amounts to legislation by the courts.

In essence, what we are saying is that jurors, being only human, are always going to be guided to some degree by their biases and prejudices. The "reasonable man" test cannot prevent the rich man, who can afford the

ablest of counsel, from recovering a hundred thousand dollars for an injury to his back while the poor man with the same injury recovers only ten thousand. Similarly, no set of standards, no legislature, and no court can ever totally eradicate injustice in capital cases.

This leads us logically to our next point which is well illustrated by a comparison of petitioner's brief and that of the *amici curiae*. At page 14 of the *amici* brief appears the following statement:

> Ill. Rev. Stat. Ch. 38, Sec. 1-7(g) (1967) does provide that the Court may hear evidence in mitigation before deciding if death is proper. Such evidence may concern the "moral character, life, family, occupation and criminal record of the offender." But nowhere in this statute does a standard appear by which the jury or judge can assess these very vague "mitigating circumstances."

In sharp contrast to the above quotation, petitioner points out at page 36 of his brief that: "In the process, hopefully, (the Judge) gains some generalizable experience, develops bases for rational comparative judgments; in any event, minimally, he evolves a 'feel' for how the cases 'line up'."

These two statements make it abundantly clear that it will never be possible to draft a set of considerations in mitigation of punishment which pleases everybody; and if we cannot agree on what considerations are relevant to mitigation, how can we ever possibly hope to agree upon a set of standards that has enough substance to be of some

benefit and yet is capable of being explained in sensible terms to a layman juror?[1] It is interesting that petitioner does not offer a model standard or set of standards.

II

Arkansas' single-verdict procedure for the trial of capital cases violates the constitution.

Like the argument of petitioner with regard to standards, this point is likewise neither new nor novel, and respondent respectfully submits that what this Honorable Court stated in *Spencer* v. *Texas*, 385 U. S. 554, 567, 568, 87 S. Ct. 648, 17 L. Ed. 2d 606 (1967) is determinative of the question:

> "To say that the two-stage jury trial in the English-Connecticut style is probably the fairest, as some commentators and courts have suggested, and with which we might agree were the matter before us in a legislative or rule-making context, is a far cry from a constitutional determination that this method of handling the problem is compelled by the Fourteenth Amendment. Two-part jury trials are rare in our jurisprudence; they have never been compelled by this Court as a matter of

[1]You look at this problem of standards right in the face and it's awfully easy to talk about ships without rudders or compass; boats without oars and so forth, and about assigning a fox terrier to one person or another without standards, but in this area you just can't find workable standards. Any kind of formula that you put up would simply be magic words, at best. We haven't heard of any precise standards that wouldn't be like mouthing formulas to the jury that it should take into consideraion such and such factors and so forth. You can't get anything as precise as a rudder or an oar and so forth. That being the case, the question is whether you are going to have death or not. The State could say that every killing or certain killings, just automatically brought on the death penalty. The present system is a dispensation that the State has made. See transcript of proceedings of Supreme Court of California, **In re Anderson**, Crim. No. 11,572, March 28, 1968, pp. 107-108.

constitutional law, or even as a matter of federal procedure."

And the Court further stated:

> "To take such a step would be beyond the pale of this Court's proper function in our federal system. It would be a wholly unjustifiable encroachment by this Court upon the constitutional power of the State to promulgate their own rules of evidence to try their own state-created crimes in their own state courts, so long at their rules are not prohibited by any provision of the United States Constitution, which these rules are not." (385 U.S. 569).

The Eighth Circuit Court of Appeals denied petitioner any relief on this point[3] on the basis of its prior decision in *Pope v. United States* 8 cir. 372 F. 2d 710, 727-730 (1967), wherein the Court noted:

> It may be the two-stage trial can be appropriately developed and made to serve a useful purpose under these statutes as they presently exist. It may be that the better solution is for the statutes to be revised so as to place the punishment power back in the hands of the judge where it traditionally has rested. It may be that the ultimate answer is legislation authorizing some narrow appellate review of sentences in extreme cases. These, however, are preliminary legislative matters for the Congress and not for the judiciary.

Petitioner cites *Hill v. United States*, 368 U.S. 424, 82 S. Ct. 468, L. Ed. 2d 417 (1961), for the proposition that "This Court has already recognized that allocution may in some circumstances rise to the dignity of a due process command." (Petitioner's brief p. 71). Respondent

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[3]Maxwell v. Bishop, supra.

cannot agree with this citation, particularly in view of what was said in *Stevens* v. *Warden*, 238 F. Supp. 334 (D.C. Md. 1965):

> The right of allocution in non-capital cases is not a right guaranteed by the Fifth or Fourteenth Amendments *Hill* v. *United States*, 368 U.S. 424, 428, 82 S. Ct. 468, 7 L. Ed. 2d 417 (1961), *McGrady* v. *Cunningham*, 4 Cir., 296 F. 2d 690, 96 A.L.R. 2d 1268 (1961), although it is required by the Federal Rules of Criminal Procedure and by statute in several states."

Respondent's position on this point is further supported by the following statement from *Segura* v. *People*, Colo. , 431 P. 2d 768, 769 (1967):

> It is argued that to compel the presentation of this evidence would result in prejudice to defendant's right to decline to testify. Admittedly the Colorado statute requires the defendant to choose whether he will take the stand himself in an attempt to mitigate the crime, or to decline to testify. There is nothing in the statute which prevents the introduction of relevant evidence to establish mitigating circumstances. Such circumstances can be shown by witnesses other than the defendant. At the trial of defendant on the issue of guilt, no evidence whatever was offered on his behalf. It may well be that a better method of determining punishment could be devised. Numerous states in the nation follow the Colorado practice. We know of no jurisdiction in which it has been held that this practice purports to deny constitutional rights.

For the foregoing reasons, respondent respectfully submits there is no merit to this contention.

CONCLUSION

It appears to respondent, that this case is a prime example of the age-old situation of the man who wants to have his cake and eat it too. Petitioner first wants two juries. The second of these, the punishment jury, is somehow to be instructed as to all the things that it may and may not consider in determining the punishment. Further, in presenting evidence to this punishment jury he wants to be allowed to tell all the good things about himself while the prosecutor is prohibited from saying bad about him because "Allowing the trial jury access to unfavorable background information, however pertinent to the issue of punishment and however clearly limited by jury instructions to that use, may itself amount to a denial of due process of law." (Petitioner's brief p. 74). Thus, he seeks to make it impossible to ever get a death verdict, to outlaw the death penalty, which is merely doing indirectly what convicted defendants have never been allowed to do directly. This should not be permitted, and the judgment below should be affirmed.

Respectfully submitted,

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In The

Supreme Court of the United States

October Term, [redacted] 1969

No. [redacted] 13

WILLIAM L. MAXWELL,

Petitioner,

v.

O. E. BISHOP, Superintendent of Arkansas State Penitentiary,

Respondent.

BRIEF AMICI CURIAE OF THE NATIONAL COUNCIL ON CRIME AND DELINQUENCY

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1968

No. 622

WILLIAM L. MAXWELL,

Petitioner,

v.

O. E. BISHOP, Superintendent of
Arkansas State Penitentiary,

Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the Eighth Circuit

BRIEF AMICI CURIAE OF THE NATIONAL COUNCIL ON CRIME AND DELINQUENCY

Statement of Interest of the Amicus

The National Council on Crime and Delinquency is a non profit membership corporation, incorporated under the laws of the State of New York, with a membership of over 60,000 citizens and officials. It was organized in 1907 and incorporated under the name of the National Probation Association in 1921.

The National Council is concerned with the prevention, control, and treatment of crime and delinquency. It has inves-

tigated the relationship between capital punishment and crime and delinquency, and has concluded that the use of capital punishment is not justified as a crime control tool, and that in fact it has a deleterious effect on efforts to reduce the incidence of criminal behavior in this country through correctional rehabilitation.

The Board of Trustees of the National Council therefore adopted a resolution condemning capital punishment at its meeting on April 22, 1963. This action was ratified by the membership of the Council at the annual meeting held on June 10, 1963, through the adoption of the following resolution:

> *Whereas* the death penalty is the antithesis of the rehabilitative orientation of modern scientific penology, and
>
> *Whereas* it has been demonstrated throughout history that the death penalty has not been a deterrent to crime,
>
> *Be it resolved* that the National Council on Crime and Delinquency recommends the abolition of the death penalty in all jurisdictions.

The resolutions, with a supporting analysis of the data, are printed in *Crime and Delinquency*, April, 1964, at pps. 105-109.

In furtherance of the positions taken in these resolutions, and in an effort to bring before this Court certain aspects of the overall capital punishment problem that were not stressed in this case below, the National Council on Crime and Delinquency sought and obtained the consent of the parties to the filing of an *amicus curiae* brief by the National Council. Copies of their letters will be submitted to the Clerk with this brief.

ARGUMENT

I.

An Inherent and Unavoidable Vice of the Death Penalty is That in All Cases Persons Executed Are Deprived of Due Process of Law.

The death penalty inevitably deprives any person who has been executed of due process of law. Killing a convicted man renders due process of law inoperable. It is an inherent vice that cannot be remedied except by abolition of the death penalty, to protect due process, if on no other ground.

When the condemned man is executed, errors in the proceedings are placed beyond the reach of later decisions that would provide new grounds for examining whether the proceedings leading to the execution contained error. The prejudiced-jury case decided by the Supreme Court has held that a death sentence imposed by a jury from which were excluded men who indicated they were opposed to the death penalty, was not representative of the community. *Witherspoon v. State of Illinois*, 391 U.S. 510 (1968).

This new doctrine, this Court holds, is retroactive; it applies to those in death rows all over the country. But it also means that among those who have already been executed, there were many whose cases would have to be reopened—if they were alive. Their execution deprived them of due process of law.

Furthermore, a dissenting opinion held that the majority did not go far enough. Said Justice Douglas, "I see no constitutional basis for excluding those who are so opposed to capital punishment that they would never inflict it." Suppose that juries conforming to the *Witherspoon* standard decree more executions—and that presently, as has happened often, the

dissenting view becomes the majority view. Any persons executed under the *Witherspoon* rules but in violation of the dissenting view would then be in a legal position to challenge their death sentence—if they were alive. Due process too late is due process denied, decidedly so in death sentence cases.

The Supreme Court invalidated the death penalty provisions of the Federal kidnapping law and the Federal Bank Robbery Act. *United States* v. *Jackson*, 390 U.S. 570 (1968); *Pope* v. *United States*, 392 U.S. 651 (1968). But six men were executed under the kidnapping law, according to a newspaper survey. New York Times, April 9, 1968. Surely they were deprived of due process of law—and every man executed is similarly deprived of due process of law, since he cannot be given the benefit of new holdings or of the finding of new facts that might be sufficient to reopen his case.

Turning to the instant case—what if the Court upholds the death sentence and the sentence is carried out? Members of the Supreme Court have already indicated their view that capital punishment for a crime less than murder is so disproportionate as to constitute cruel and unusual punishment, within the rule of *Weems* v. *United States*, 217 U.S. 349 (1909). *Rudolph* v. *Alabama*, 375 U.S. 889 (1963).

It is not at all beyond possibility that presently, perhaps within a few years, this Court will adopt that view. Then this defendant, if already executed, will have no recourse to be spared the death penalty under this Court's rules. There is only one way to protect the due process of rights of this defendant—by repudiating the death penalty.

II. The Requirement of Criteria

It has been suggested that due process of law requires that sentences should be consistent with the evidence in the record,

and should be rationally explained. Rubin, "*Sentences Must Be Rationally Explained*," 42 F.R.D. 203 (1967). It cites one death sentence case, upheld by the Arizona Supreme Court. *Arizona* v. *Fenton*, 86 Ariz. 11, 341 P. 2d 238 (1959), cert. denied, 361 U.S. 877. The defendant, twenty-four, lived with the decedent and her husband, owners of a drug store, for about a month, doing odd jobs for them. Then, having secured a full-time job, he was asked to vacate his room when out-of-town guests were expected for a visit. The decedent gave the defendant $20 when he left, and she offered further help. Ten days later the defendant returned to decedent's home, demanded $200 of her, and was given $40. Not satisfied, he hid in the house and, when she returned, he struck her with a gun. He claimed that when he struck her the gun went off accidentally, and that he became panicky and shot her several more times.

Prior to imposition of sentence the defendant was examined by a psychiatrist and a psychologist, who found that the defendant was psychopathic. They reported that a person of his mental condition did not "often profit by incarceration," and that the only treatment is a "protective environment such as institutional care." The defendant's history was one of numerous assaults and inability to hold a job or get along with people. Before imposing sentence the trial judge gave his version of what he had been told by the doctors in these words: "At the present time they have no cure for him; prison will not help the man and if he were to be released—and I confess I have taken that into account as a possibility, . . . he would perhaps and probably, at least in the present state of medical science, be a danger to the community." The sentence was upheld.

The Arizona Supreme Court overlooked the fact that the sentencing judge's rationale was in conflict with the psychological findings. "No cure for him; prison will not help the

man," the sentencing judge said, whereas the psychiatric report said that such individuals do not often profit by incarceration but that the only treatment is institutional care—a view which the court rejected.

The trial judge had also written, "If example will do any good at all; a man's life might be saved in the future and if it were saved, I know it would be a better life than this man's"—but, as the psychiatrist stated and as he is quoted by both the trial judge and the Supreme Court, the characteristic of sociopaths and psychopaths is that they do not learn.

Here a death sentence is upheld contrary to any rational justification, indeed, in contradiction to the information about the defendant found in the record. This result may be contrasted with another case of three death sentences, two of which were reversed by another state supreme court. Three young men planned to rob a pharmacy. One of them, Williams, led the proprietor to the rear of the store, and after warning him to "shut-up" shot and killed him. Williams and his co-defendants, Cater and Rivers, pleaded guilty. All were sentenced to death for the murder.

The Supreme Court of Pennsylvania said: "The sole and important issue presented by these appeals is—did the court below err in sentencing each defendant to death? . . . The steadfast refusal of this Court to limit in any respect the discretion in sentencing given a trial court is in accord with the prevailing American view. . . . While we do not substitute our judgment for that of the sentencing court, we look to see in every capital case whether the trial court abused its discretion by overlooking pertinent facts or disregarding the force of evidence, or erred in its law. . . .

"In its opinion, the court *en banc* discussed the culpability of all three appellants together and in so doing inadvertently

applied certain statements made in the confession of one of the appellants equally to the others. Thus, the court erred in stating that 'all three [defendants] went to Cater's house to procure the gun long before the holdup.' The fact is that there is no evidence in the record to support this statement as against Cater or Rivers. Similarly, the court was mistaken in its belief that as to Caters and Rivers the motive for the crime was 'the discharge of aggressive hatred.' Again, there is no evidence to support such a characterization." *Commonwealth* v. *Cater*, 396 Pa. 172, 152 A. 2d 259 (1959).

The requirement of rationality in a sentence should be especially required in capital cases. If the sentence is by a jury then they must be suitably instructed as to the circumstances justifying a death sentence; if by a judge, then he should give reasons for death.

In a decision in June, 1969, the Supreme Court endorsed the use of criteria and findings in certain sentencing situations. In *North Carolina* v. *Pearce*, 89 S. Ct. 2072, it held that upon a second sentencing after a new trial is ordered, the second sentence may exceed the sentence imposed after the first trial only if new data are present. Then it said: "We have concluded that whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear. Those reasons must be based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding."

Sentencing in death cases was referred to in *North Carolina* v. *Pearce*.. The Court cited *Stroud* v. *United States*, 251 U.S. 15 (1919), in which it held that a defendant who received a life sentence for first degree murder, upon securing a reversal of the conviction could be retried for first degree murder and

sentenced to death. With the requirements now made mandatory in *North Carolina* v. *Pearce*, such a death sentence can be imposed only if "the reasons . . . affirmatively appear." Should not *any* death sentence be based upon reasons?

The need for this is emphasized by the disposition of the Court of Appeals in the present case in rejecting the presumption petitioner seeks to draw from the statistics of discriminatory sentencing. The Court says (p. 39 et seq. in appendix) that it rejects the inference from the statistics because: "1. They do not relate specifically to Garland County where this particular offense was committed and where Maxwell was tried and convicted. . . . 2. They admittedly do not take every variable into account. 3. They do not show that the petit jury which tried and convicted Maxwell acted in his case with racial discrimination."

Without acknowledging that this argument is sufficient to overcome the presumption of discrimination to be drawn from the statistics, the Court of Appeals has thus stressed the importance of recognizing that there are factors that may be operative in the mind of the jury. The factors are indeed important. If this were a capital case to be disposed of solely by the judge, it would be important for him (the Court of Appeals implies) to somehow deal with the factors leading to a sentence of death.

All the more reason, therefore, that somewhere the ingredient of rationality in the sentence be required, at least in a capital case (rather than—least of all in a capital case). As is pointed out in the petitioner's brief, at p. 31, the Arkansas Supreme Court considers itself powerless to review a death sentence, whereas it does reduce jury-fixed sentences in non-capital cases. This is topsy-turvy. Due process should require that at least equal review be given in capital cases; but of course, to

review such a sentence requires either findings, the giving of reasons, or criteria contained in jury instructions.

The Court of Appeals in rejecting the claims of petitioner on discriminatory application of the death penalty to Negroes, said—"At oral argument we asked Professor Amsterdam, counsel for Maxwell, whether (apart from any Eighth Amendment argument) his statistical approach would not mean that it would be constitutionally impossible for a negro defendant in Arkansas ever to receive the death penalty upon conviction of the crime of rape of a white woman. The answer given us was in the affirmative, that is, that it would be constitutionally impossible. At the same time it was conceded, in contrast, that it would be possible for a white man to receive the death penalty upon his conviction for rape. When counsel was asked whether this would not be discriminatory, the reply was that once the negro situation was remedied the white situation 'would take care of itself.'"

More needs to be said on this point. Applying rationality and constitutional requirements to sentencing may well require a readjustment of past and current practices. Let us assume that because of one vice or another, a ruling might result in invalidating execution of Negroes for rape. Then, says the Court of Appeals, could a white man be executed for rape of a white woman? It feels that the affirmative answer is unacceptable. But if the requirement of equality is to be applied to death sentences for rape, and Negroes cannot be executed, then whites cannot either. See comment, *The Right to Nondiscriminatory Enforcement of State Penal Laws*, 61 Colum. L. Rev. 1103 (1961); Rubin, *"Disparity and Equality of Sentences — A Constitutional Challenge"* 40 F.R.D. 55.

Where is the disaster in this outcome? Do we devotedly wish to execute somebody for rape, and if it will not be whites,

let it be Negroes? If in fact—which is what we earnestly contend—there is no rationality in the death penalty, and none can be found once the rudiments of due process of law are applied, what is it that is being contended for by the state, and sustained by the Court of Appeals? That the state may say "die" to a defendant without giving reasons or justification. If that is the reality of our current law, it ought to be countenanced no longer, for its constitutional defects.

III.

Courts Must Examine the Physical and Psychological Cruelty of Executions.

For an execution to be approved by any court, the obstacle—if it is one—of the Eighth Amendment must be overcome. The Supreme Court has a number of times held that the death penalty does not violate the Eighth Amendment. But it has not examined the cruelty that may be involved in the execution itself.

The Supreme Court has said: "The cruelty against which the Constitution protects a convicted man is cruelty inherent in the method of punishment, not the necessary suffering involved in any method humanely employed to extinguish life humanely." *Louisiana ex rel. Francis* v. *Resweber*, 329 U.S. 459 (1947), reh. denied, 330 U.S. 853.

The Court in that passage has used the word "humanely" twice, to apply to the *method of* execution. Yet, as one commentator observed, "Careful review of the opinions and close analysis of the language of the decisions support the view that the constitutionality of capital punishment depends on questions of judicially noticeable fact. The evidence, responding to the language and opinions of the judges, has not heretofore been presented in any of our courts." Gottlieb, "*Testing the Death Penalty*," 39 So. Cal. L. Rev. 268, 270 (1961).

At least one state legislature was led to abolish the death penalty through the cruelty of hanging. An unauthorized reporter witnessed a hanging—of a man who to the end claimed that he was innocent—in which the rope was too long, and the victim had to be held up while the sheriff and deputies pulled on the rope. As reported in the St. Paul Dispatch, Feb. 13, 1906, death came by strangulation after fourteen and a half minutes. The report praised the demeanor of the condemned; the headline read, "*DISPLAYED HIS NERVE TO THE VERY LAST.*" As for the crowd, the reporter wrote: "The spectators who saw the execution were in haste to make their departure after it was over. 'Yes, I saw it,' said one. 'But, ugh, I never want to see another one.' It is safe to say that the feature of a crowded execution was eliminated by Sheriff Miesen; but, if the number of persons who left the jail at its close are any index of the number who saw it, it is certain that the six persons designated in the law as the number the sheriff may personally invite was unmercifully stretched. People of a morbid turn, attracted by the hangings, began to gather around. The three sides of the building were lined by them. All were eager to catch a glimpse of the condemned man as he walked from his cell to the waiting elevator that was to lower him to the basement, where death awaited him." The next day the press reported the governor's outrage at the sheriff's behavior in admitting twenty-five or thirty people, and particularly at the admission of reporters. But the protest was on; and the state of Minnesota abolished the death penalty in 1911. See Rubin et al., *The Law of Criminal Correction*, 318, 324, n. 47 (1963).

Eighty-one years ago a New York governor who sought and obtained passage of a bill to substitute electrocution for hanging (Laws of 1888, ch. 489) said: "The present mode of executing criminals by hanging has come down to us from the

dark ages, and it may well be questioned whether the science of the present day cannot provide a means of taking the life of such as are condemned to die in a less barbarous manner." The Supreme Court quotes these words two years later, *In re Kemmler*, 136 U.S. 436 (1890), but still it upheld hanging, *Ex parte Medley*, 134 U.S. 160 (1889), as well as electrocution.

The Court has not considered the mental cruelty imposed not only on the one who is being executed but also on many other persons who are under sentence of death but will not be executed because of innocence or legal error or clemency. Reprieves are granted only minutes before an execution is scheduled to occur. A man sentenced in Texas to die for the rape-murder of a three-year-old was reprieved less than three hours before he was to die, upon the confession of another man to the crime (New York Post, Feb. 5, 1958); John Resko was reprieved twenty minutes before his scheduled execution—Resko, *Reprieve* (1956). But Burton W. Abbott was executed in California on March 15, 1957, two minutes before the governor's reprieve was telephoned to the warden (New York Times, March 16, 1957), and often, apparently as regular practice, commutations are granted only shortly before the scheduled time of execution. See Rubin et al., op. cit. supra at 340, n. 132.

The Court did say, in 1889, "when a prisoner sentenced by a court to death is confined in the penitentiary awaiting the execution of the sentence, one of the most horrible feelings to which he can be subjected during that time is the uncertainty during the whole of it, which may exist for the period of four weeks, as to the precise time when his execution shall take place." *Ex parte Medley*, *supra*.

In 1952 in the case of *Musselwhite* v. *State*, 215 Miss. 363, 60 So. 2d 807 (1952) the Mississippi Supreme Court indefinitely stayed an execution. It said: "There is agreement

among the examining physicians that at the time of the hearing the petitioner had lost awareness of his precarious situation. . . . If he were taken to the electric chair, he would not quail or take account of its significance. There is reaction neither to audible nor physical stimuli. He takes no nourishment voluntarily. . . . We accept therefore the finding that the petitioner is insane and that such insanity has befallen him since his conviction nearly two years ago. . . . We declare immunity to any clamor of vengeance or to the moving recitals of a brutal murder heretofore adjudged and condemned. We are content to stand upon ground higher than the common urge of outraged reprisal which revives the *lex talionis*, demanding a life for a life."

It is true that the evidence here was considered in the context of the rule that an insane person may not be executed. But the facts recited by the court suggest that the insanity was the result of the imposition of the death sentence; and it is significant in demonstrating the kind of evidence that may be brought to bear on the general psychological results on persons committed to await death.

One study of that kind was made by Dr. Harvey Bluestone and Carl L. McGahee, published in an article entitled, "*Reaction to Extreme Stress: Impending Death by Execution*," Am. J. of Psychiatry, November, 1962. In the group of prisoners studied, a variety of destructive phenomena occurred to all their personalities, with perhaps one exception, including symptoms of psychopathy, delusion, a variety of obsessions and degrees of withdrawal.

It is even easier to bring to bear the evidence of physical cruelty. The physical cruelty of the actual execution has at times been described. Alabama uses the electric chair in its executions. In articles in the Montgomery Advertiser, Danielle

Harris described what happens, as told to her by officer McDaniel, who had witnessed about twenty executions, and Lt. W. L. Traywick, who had witnessed eight.

The final switch is thrown and the electricity strikes the body which stiffens violently.

The clenched fists whiten and turn slowly upward as the current builds up to a maximum of 2,500 volts. This is a reflex action. A blister begins to rise on the lower left leg beneath the electrode.

The noise is loud. The dying man fights the straps with amazing strength. Unusually, some smoke rises up from the chair.

"It is a most violent death but it's over in 40 seconds," said Traywick. (October 23, 1961)

• • •

Rex Thomas, Associated Press writer here, has probably witnessed more electrocutions than anyone in Alabama. He describes unforgettable death chamber scenes.

Years ago, a Negro boy and his brother were sentenced to die one week apart. After the first was electrocuted, his brother was so emotionally upset that during the death walk, he broke away from guards and lunged into the electric chair. Thomas commented, "the boy just couldn't wait to meet his maker."

Thomas has seen bodies catch on fire in the chair, filling the death chamber with smoke and the smell of burning human flesh.

"That's something you just don't forget," he said.

The body will burn if it requires a second or third jolt or if the condemned perspires excessively.

One guard said the worst part of an electrocution is removing the hood from the head of a man who is badly burned.

Ordinarily, however, the body requires only one jolt of electricity and does not burn, or burns only slightly where the electrodes are attached to the head and lower left leg.

The jolt caused a man's eyeball to fall from its socket in one case.

Another time the waist strap broke while a big, powerful Negro was being electrocuted. "He darn near came out of that chair," said Thomas.

The black hood has been known to drop down, revealing the face of the dying man.

False starts are uncommon but have occurred.

"One of the worst cases I've ever seen," said officer Alford, was a Negro from Troy convicted of murder. He fought us all the way to the death chamber. Several of us had to overpower him to get him strapped in the chair."

Guards have been known to "go all to pieces" during episodes such as these. "Some just can't take it." "Their nerves just don't hold up."

"The guards are always nervous before and during an electrocution," said Alford. "In my opinion it's something you never become accustomed to. It's the most gruesome job I've come in contact with during my 35 years with the department." (October 25, 1961)

(Excerpts reprinted in Rubin, *The Supreme Court, Cruel and Unusual Punishment, and the Death Penalty*, 15 Crime and Delinquency, 121, 128-29 (1969).)

For additional sources see comment, "The Death Penalty Cases," 56 Calif. L. Rev. 1268, 1332-1343.

The Supreme Court having said that in the application of the death penalty the Constitution protects against "cruelty inherent in the method of punishment," and also that any method of execution must be "humanely employed," a trial court must consider the question of cruelty involved in the mode of execution ordered. Its failure to do so is a defect in the proceedings. If there is no humane way to execute a man, this is as effective a bar to any execution as the realization that, once criteria are established and applied, there is no rationality to the execution itself.

CONCLUSION

For the foregoing reasons, amicus urges that the judgment of the Court of Appeals be reversed.

Respectfully submitted,

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No. 13

In the

Supreme Court of the United States

OCTOBER TERM, 1969

WILLIAM L. MAXWELL,

Petitioner,

vs.

O. E. BISHOP, Superintendent of Arkansas State Penitentiary,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

MOTION FOR LEAVE TO FILE BRIEF OF AMICI CURIAE AND BRIEF OF AMICI CURIAE

Submitted By

American Friends Service Committee,
Board of Social Ministry, Lutheran Church in America,
Church of the Brethren, General Board,
Council for Christian Social Action of the United Church of Christ,
Department of Church in Society of the Christian Church (Disciples of Christ)
The Executive Council of the Episcopal Church in the United States (Experimental and Specialized Services Section)
General Board of Christian Social Concerns of the United Methodist Church
Greek Orthodox Archdiocese of North and South America,
The American Ethical Union
The United Presbyterian Church in the United States of America by George E. Swearey, Moderator and William P. Thompson, Stated Clerk of the General Assembly.

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The above religious organizations by their attorneys, Willard Lassers and Elson, Lassers and Wolff, (Alex Elson, of counsel) and Elmer Gertz, move for leave to file a brief *amici curiae* in support of petitioner, William L. Maxwell. In support of this motion the religious organizations represent as follows:

The legal arguments on behalf of petitioner have been ably presented by his counsel. There are, however, a number of ethical considerations of deep concern to the religious organizations. Most of these organizations formally have taken stands in opposition to capital punishment.[1] They are aware that the issue of the death penalty as such is not at bar.

They desire to present a point of view somewhat different from that of petitioner, which they think will contribute to a more complete understanding of the case. Hence ask leave to file this brief.

These organizations have a total membership exceeding 34,580,000. They are:

1. AMERICAN FRIENDS SERVICE COMMITTEE.

The Americans Friends Service Committee, has, since 1917, engaged in religious; charitable, social, philanthropic and relief work on behalf of the several branches and divisions of the Religious Society of Friends in America. There are approximately 123,000 Friends in the United States. The American Friends Service Committee, [illegible]

[1] The statements appear in the appendix to the amicus brief filed on behalf of the American Friends Service Committee, et al, in *Witherspoon* v. *Illinois*, O.T. 1967, No. 1015. Substantially every major denomination has expressed its opposition to the death penalty. The statements appear in the *Witherspoon* brief.

though it cannot speak for all Friends, has a vital interest in this litigation because of Friends' historic and continued opposition to the taking of human life by the State. Such opposition to capital punishment goes back more than 300 years, to the beginning of the Quaker movement and stems from Quaker belief that there is an element of the divine in every man.

2. BOARD OF SOCIAL MINISTRY, LUTHERAN CHURCH IN AMERICA

The Board of Social Ministry is an instrumentality of the Lutheran Church in America. Its object is "to inquire into the nature and proper obedience of the church's ministry within the structures of social life . . . devoting itself in particular to those aspects of the church's ministry in which individual and social needs are met as an expression of Christian responsibility for love and justice."

The 1966 biennial convention of the Lutheran Church in America adopted a social statement on capital punishment encouraging abolition of capital punishment. The Lutheran Church in America has 3,300,000 members in 6,225 congregations in the United States and Canada.

3. CHURCH OF THE BRETHREN GENERAL BOARD

The Church of the Brethren General Board is the administrative arm of the Church of the Brethren. It carries out policies adopted by the church's legislative arm—Annual Conference—in the areas of world ministries, parish ministries and general services. Among its world ministries are efforts to correct social injustices at home and abroad. The Church of the Brethren has adopted

policy statements opposing capital punishment on several occasions, the last one being in 1959 at the Annual Conference. The Church of the Brethren has 200,000 members in approximately 1,000 churches.

4. COUNCIL FOR CHRISTIAN SOCIAL ACTION OF THE UNITED CHURCH OF CHRIST

The Council for Christian Social Action is an instrumentality of the United Church of Christ devoted to promoting education and action in international, political and economic affairs. The Council stated its position in opposition to capital punishment in a policy statement of January 30, 1962. The United Church of Christ has over 10,000,000 adherents.

5. DEPARTMENT OF CHURCH IN SOCIETY OF THE CHRISTIAN CHURCH (DISCIPLES OF CHRIST)

The Department of Church in Society of the Division of Church Life and Work is a part of The United Christian Missionary Society, a national unit of the Christian Church (Disciples of Christ). The Christian Church has approved two resolutions on capital punishment in its International Convention. The first resolution, approved in October 1957 at Cleveland, Ohio, stressed the need for rehabilitation of criminals and indicated that "the practice of capital punishment stands in the way of more creative, redemptive and responsible treatment of crime and criminals. The second, "Concerning Abolition of Capital Punishment," was approved in the October 1962 Assembly of the International Convention at Los Angeles, California. This resolution specifically placed the Christian Church (Disciples of Christ) on record as

"favoring a program of rehabilitation for criminal offenders rather than capital punishment."

The Christian Church (Disciples of Christ) in the United States and Canada has a membership of 1,600,648.

6. THE EXECUTIVE COUNCIL OF THE EPISCOPAL CHURCH IN THE UNITED STATES (EXPERIMENTAL AND SPECIALIZED SERVICE SECTION)

The Executive Council is the principal administrative body of The Domestic and Foreign Missionary Society of The Protestant Episcopal Church in the United States of America which has 7,546 parishes and missions, 11,362 ordained clergy and 3,588,435 baptized members.

7. GENERAL BOARD OF CHRISTIAN SOCIAL CONCERNS OF THE UNITED METHODIST CHURCH

The General Board of Christian Social Concerns is an instrumentality of the United Methodist Church. Its purpose is to further the works of the church in the sphere of social affairs. The United Methodist Church at its 1960 General Conference adopted a statement opposing the death penalty. The statement was revised in 1964 and is now part of United Methodist Social Policy. The United Methodists number 11,000,000 members among their 38,000 churches which are situated in every state.

8. GREEK ORTHODOX ARCHDIOCESE OF NORTH AND SOUTH AMERICA

The Greek Orthodox Church expresses the belief that every person should be afforded every opportunity to establish his innocence. If he is found guilty, he should be

afforded every opportunity to present what evidence he can to mitigate his guilt. The Greek Orthodox Church consists of 500 parishes, largely in the United States and Canada, and some in Central and South America. The membership of the Church is 1,500,000.

9. THE AMERICAN ETHICAL UNION

The American Ethical Union is a federation of the Ethical Culture Societies and Fellowships in the United States, which, collectively constitute a liberal religious humanist fellowship known as the "Ethical Movement" or the "Ethical Culture Movement."

The first Ethical Culture Society was founded in New York City in 1876 by Dr. Felix Adler. There are today 24 Societies and Fellowships of the American Ethical Union in ten states and the District of Columbia. The American Ethical Union is a member of the International Humanist and Ethical Union, a world-wide organization, with headquarters in Utrecht, The Netherlands. Religious humanists oppose the death penalty. The American Ethical Union has adopted policy statements calling for its abolition, and Members and Leaders (Ministers) of Ethical Culture Societies have been active and, in many instances, in the forefront of organized efforts to have the death penalty abolished throughout the United States.

10. THE UNITED PRESBYTERIAN CHURCH IN THE UNITED STATES OF AMERICA BY GEORGE E. SWEAZY, MODERATOR AND WILLIAM P. THOMPSON, STATED CLERK OF THE GENERAL ASSEMBLY

The United Presbyterian Church adopted a statement condemning the death penalty at its 171st general as-

sembly in 1959 and adopted a revised statement at the 177th General Assembly in 1965.

The United Presbyterian Church in the United States of America has a membership of 3,250,000. It has 8,750 churches throughout the nation.

Petitioner has consented to the filing of this brief. Consent has been requested of respondent, but we have not yet received a reply.

Respectfully submitted,

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BRIEF OF AMICI CURIAE

Amici ask this court to hold for petitioner both on the unitary trial issue and on the lack of standards issue. It is the unitary trial issue that appears to raise particularly grave ethical problems, and for that reason these *amici* confine their brief to that issue.

I.

Imposition of the Death Penalty In a Unitary Trial Is a Deprivation of Life and Liberty Without Due Process

The death penalty is the most awful penalty the law can impose. Of all murderers, only a few are selected for the supreme sentence. One would suppose that those so selected are chosen only after the most searching probe into every phase of their lives, their character, their motivation and their personalities. For those who plead guilty and for those who elect a bench trial, the opportunity for such probe is open. But in most states, for the defendant who pleads not-guilty, and elects a jury trial, the door to such probe, realistically, is closed. Because he asserts his innocence, he must yield his opportunity to an effective plea for mercy.

To be sure, the right to present evidence in support of a plea for mercy and a plea itself is preserved—nominally. The accused may both argue his innocence and at one and the same time assert that if his defense is disbelieved, the jury should spare his life. But such a defense surely is self-destructive. The jury of laymen scarcely will appre-

ciate the dilemma of the accused. Hence, the plea for mercy almost surely will be interpreted as a confession of guilt. The evidence of innocence disbelieved may influence the jury to impose the ultimate penalty upon an accused who, they deem, sought to trick them into accepting a false tale. The alternative is during the trial to present nothing, or, at any rate a minimum in support of a plea for mercy. This course means risking all on the plea of innocence. Thus the accused is presented with a cruel dilemma of trial tactics.

But far more is involved than a hard choice of trial strategy. Moral issues are at stake as well. A defendant who asserts his innocence may well decline to plead for mercy, apart from the effect of such plea on his chance of acquittal. The moral man might well find it wrong to plead for mercy for a crime he asserts he did not commit, at least until a judgment of guilt has been passed upon him. Only at such point, having been judged by a fallible human judgment, might a man feel free to ask for the sparing of his life.

For the community, the moral issues are more complex, more profound. Many defendants, perhaps most, will elect to make no plea for mercy, preferring to rely on the plea of innocence. In such case the jury makes its choice, knowing nothing of the defendant as a human being. Yet it is asked to consider the extreme penalty for him.

This, we think, imposes an immoral task upon the jury, wholly apart from the issue of the morality of capital punishment itself.

Since most death sentences are imposed for murder, let us consider this crime.

The Sixth Commandment is "Thou shalt not kill." Every step in the enforcement of this commandment by society is fraught with the greatest difficulties.

A human being is slain by another. To identify the killer often is a subtle, baffling task. Often guilt or innocence as found by a court turns on the question whether the jury believes one man or another; whether the rules of evidence permit or exclude one or another bit of evidence, and similar issues. Having made a decision that the defendant is responsible for the death, then the jury has an even more elusive task. Despite the infinite complexity of human motivation, the crime must be categorized into one of two or three legislatively defined classes, such as "murder", "voluntary manslaughter", etc.

If the jury chooses the label "murder", then it must fix the punishment. Life and death are in its hands. Here, we think, the religious and ethical teachings of our Judaic-Christian heritage have special relevance. Only divine judgments are perfect. God alone can assess truly the measure of a man's culpability. The truth of this ancient teaching has been reaffirmed and reinterpreted for us by modern learning concerning human motivation. Yet, by an accident in the development of the law, a man may be sentenced to death, deprived of an effective opportunity to present evidence in mitigation. The voice of the accused himself is effectively stilled to plead for his own life. Even his counsel cannot make a plea for him, or if he does so, must mute his speech. The jury which dooms a man may know nothing of him as a man, or as a human being. His childhood, his youth, his education, his work, the circumstances leading to the criminal act—the jury knows nothing of, except insofar as they are presented during the guilt-innocence trial. Counsel for petitioner

point out (Pet. Br. 73) that petitioner did not testify. Hence, "The jury who sentenced him to die therefore had heard neither his case for mercy, nor even the sound of his voice." Like Joseph K, in Kafka's *The Trial,* he is sentenced without even reasonable opportunity to submit an initial plea for mercy. Like Joseph K, on the last page of the novel, petitioner might ask, "Were there arguments in his favor that had been overlooked?" The procedure at bar would permit petitioner to perish "like a dog". The "shame of it" is upon us all.

Such procedure is surely prejudicial to the defendant. In addition, and this we stress, it compels the jurors to face an impossible moral dilemma. As jurors they are sworn to decide between life and death. Yet they are deprived, where the defendant pleads innocence, from hearing an effective plea for mercy on his behalf. The life of a man is in their hands; yet they may know almost nothing about that man as a human being. How then can their decision be a moral one? Under the circumstances, it is nearly inevitable that the jury will focus upon the *crime,* and pass judgment upon it, when it should judge the *man* and pass judgment upon him. This, we submit, is profoundly wrong.

In *Witherspoon* v. *Illinois,* 391 US 510 (1968), this Court held it in error to exclude automatically from the jury, those who had scruples against the death penalty.

By the inclusion of such persons on the jury, their moral values, too, come to be reflected in the ultimate decision. The end sought in *Witherpsoon* is to bring to the jury the widest range of public sentiment. But this more perfectly constituted jury, however, can scarcely perform its function satisfactorily, indeed morally, if it is deprived of the fullest knowledge of the man before it.

Once the sentence of death is imposed by a jury, the defendant suffers a prejudice nearly impossible to overcome, even in states such as Illinois where the judge may overrule the jury. Even if evidence in mitigation is presented to a judge, he often rejects the jury recommendation. Reviewing courts, even where empowered to do so, are reluctant to overrule a jury or a judge and jury.

The remedy for the evils of the unitary trial is not complex. The jury need only decide first the guilt or innocence of the accused. If it determines guilt, it may then hear evidence in aggravation and mitigation and fix or recommend the punishment. This procedure is used successfully in a number of states. An alternative is to empanel a separate jury solely for the fixing of the penalty. By either of these methods, the jury, within the limits of human understanding, can make a rational decision on life or death. These methods leave to the jury the sentencing power, but permits its intelligent exercise. Another possibility is to restrict the jury to the guilt-innocence issue, and to vest sentencing in the judge.

Conclusion

The unitary trial in capital cases unfairly prejudices a man on trial for his life and thus constitutes a deprivation of due process of law. It confronts the defendant with a needless moral question—shall he ask for mercy before being judged guilty and while asserting his innocence? It requires the jury to decide the awful question of life or death when frequently deprived of full knowledge of the human being before it.

The unitary trial is a bar to an effective plea by a human being for understanding and for mercy. We plead for the right to make such a plea. As we show compassion, so may we receive compassion. In the words of Amos (5:15) let us "establish judgment in the gate; it may be that the Lord God of hosts will be gracious unto" us. In the words of Micah (6:8), let us strive "to do justly and to love mercy". These words of Scripture encompass our plea.

We ask that the judgment be reversed and that this court find that due process requires the invalidation of the unitary trial in capital cases.

Respectfully submitted,

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Interest of the *Amici*

On this appeal from an Arkansas jury's imposition of the death penalty upon a Negro convicted of raping an unmarried woman of thirty-five, the *amici* have sought, and obtained, the consent of the respective parties for the submission of this brief because of their special interest as Jewish organizations in the subject of capital punishment.

The American Jewish Congress is an association of American Jews organized to oppose racial and religious discrimination and to help preserve democratic principles and practices. The other *amici*, all constituents of the Synagogue Council of America, are the recognized rabbinic and congregational representatives of the three branches of American Judaism—Orthodox, Conservative and Reform.

All of the *amici* are opposed as a matter of principle to the imposition of the death penalty and support its abolition. Their position is based on their judgment as to the demands of contemporary American democratic standards, but also has its roots in ancient Jewish tradition. This statement may seem surprising in view of the many references in the Hebrew Bible to the death penalty for such transgressions as adultery (Lev. 20:21), bestiality (Ex. 22:18), murder (Ex. 21:12) and rape of a betrothed (but not of an unmarried or unbetrothed) woman (Deut. 22:15). Indeed, these Scriptural provisions are often invoked by defenders of capital punishment.[1]

1. See, e.g., Vellenga, CHRISTIANITY AND THE DEATH PENALTY; in Bedau, THE DEATH PENALTY IN AMERICA, 124-125 (1967) (hereinafter referred to as Bedau); Hoover, STATEMENTS IN FAVOR OF THE DEATH PENALTY, in *ibid.*, 1933.

These statements, however, reflect an unfamiliarity with the full Jewish tradition, and specifically with the fact that Rabbinic Judaism during the Talmudic period, some two thousand years ago, represents the interpretation and implementation of the Scriptural command. We can fully understand the Scriptures only through their presentation by the Oral Law, of which Talmud is the prime exponent.

The definition and the application of the laws of evidence and criminal procedure in the Talmud made conviction in a capital case practically impossible. Thus, for example, it is noted that if an accused were to be convicted in a capital case the verdict could *not* be unanimous, the reasoning of the Rabbis being that if not a single one of the twenty-three judges constituting the court (Sanhedrin) could find some reason for acquittal there was something fundamentally wrong with the court. Circumstantial evidence was not sufficient to sustain a verdict in a capital case; two eye-witnesses, subjected to rigorous cross-examination by the court, were required. Moreover, the witnesses had to testify that they warned the accused *before* the crime that the act was prohibited and what its penal consequences were. (*Talmud, Sanhedrin,* 40b et seq.)

In view of these procedural requirements it is evident that conviction in a capital case was virtually impossible.[2] But perhaps most indicative of the Rabbinic view of capital punishment is the following from the Talmud (Makkot, Chap. 1, Mishnah 7):

> A *sanhedrin* which executes a criminal once in seven years is called a "court of destroyers." Rabbi Eliezer

2. "It is clear that with such a procedure conviction in capital cases was next to impossible, and that this was the intention of the framers of the rule is equally plain." 2 Moore, JUDAISM, 186 (1927).

ben Azariah states that this is so even if it executes one every seventy years. Rabbi Tarphon and Rabbi Akiba stated that if they had been members of the sanhedrin no one would ever have been executed.

One Rabbi, Simeon ben Gamliel, expressed a contrary view reflecting the most common justification for capital punishment, namely its deterrent effect. If the views of Rabbis Tarphon and Akiba were to prevail, he said, "they would increase murders in Israel." However, later commentaries note that Rabbi Simeon's was a minority view and that the others expressed the normative opinions of the Rabbis. (Maimonides, *Hilkoth Sanhedrin*, xiv., xv.)

To take a human life, the Rabbis said, is a matter of the gravest seriousness. Execution is not reversible. If a mistake is made what has been done is irrevocable. One who takes a human life, they pointed out, diminishes the Divine Image. On occasions this extreme means may be necessary to protect society. But it may be carried out only when there can be absolutely no doubt concerning the guilt of the accused and of his freely chosen, deliberate and knowing act. In view of human fallibility which is so pervasive a factor in all judgments, a drastic step such as terminating a human life was as a practical matter not defensible. (See, 3 JEWISH ENCYCLOPEDIA 554-558 (1912); Mendelsohn, CRIMINAL JURISPRUDENCE OF THE ANCIENT HEBREWS, 116-133.)[3]

3. It is for this reason that Lafayette vowed to oppose capital punishment until "the unfallibility of human judgment" was demonstrated to him. Quoted in statement by Attorney General Ramsey Clark before Subcommittee on Criminal Laws and Procedures of the United States Senate on S. 1760, To Abolish the Death Penalty, July 2, 1968 (hereinafter referred to as Statement on S. 1760).

Question to Which this Brief is Addressed

Petitioner's brief addresses itself to two points: (1) that Arkansas' practice of allowing capital trial juries absolute discretion, uncontrolled by standards or directions of any kind, to impose the death penalty upon a defendant convicted of the crime of rape violates the Due Process Clause of the Fourteenth Amendment; and (2) that Arkansas' single-verdict procedure, which requires the jury to determine guilt and punishment simultaneously in a capital case violates the Fifth and Fourteenth Amendments.

We support the arguments set forth in the petitioner's brief and associate ourselves with them. In this brief we address ourselves to an aspect of the case not discussed in petitioner's brief, but one which relates specifically to the first point in that brief. If, as we submit it should, this Court sustains the validity of that point it will be required to remand the case to the Arkansas trial jury for reconsideration of the sentence in the light of instructions to it by the trial judge. The specifics of those instructions are of course initially the responsibility of the Arkansas courts, but whatever they are they must be within the limitations of the Federal Constitution. To the extent that they are not, it may be anticipated with reasonable certainty that this case will be back before this Court.

We suggest, therefore, that it is entirely appropriate for the Court to obviate as far as practicable further avoidable appeals by stating in its opinion such minimum constitutional limitations as the Arkansas trial court will

quite clearly and unavoidably be required to cope with in framing its instructions to the jury. The most obvious of these is the appropriateness of the death penalty in a non-homicidal rape case. If the Constitution forbids imposition of the death penalty in a rape case, judicial economy would seem to dictate that the Court say so in its opinion on the present appeal so that the trial judge may act in light rather than in darkness.

This procedure is by no means unprecedented. It is, in effect, the procedure employed in much greater detail in *Miranda* v. *Arizona*, 384 U.S. 436 (1966).

Accordingly this brief *amici curiae* addresses itself to the single question: May a state consistently with the Federal Constitution impose the death penalty upon a person convicted of non-homicidal rape?

Summary of Argument

Under the Eighth Amendment to the Federal Constitution, made applicable to the states by the Fourteenth, a state may not impose punishment which is cruel or unusual. The ultimate responsibility of determining whether punishment is cruel or unusual rests not with the legislature but with the courts, and ultimately of course this Court. In discharging this responsibility the Court is not restricted to standards prevailing in 1789 when the Amendment was framed but should apply contemporary standards. Nor should these standards be limited by considerations of geographic regionalism, but should give weight to national and even international judgments. Moreover, it should consider the efficacy or inefficacy of the death penalty as

a deterrent and should give weight to the usual if not inevitable concommitants of imposition of the death penalty, such as unequal and racially discriminatory imposition. Measured by these standards the death penalty for non-homicidal rape constitutes cruel and unusual punishment within the meaning of the Eighth Amendment.

ARGUMENT

Imposition of the death penalty for non-homicidal rape constitutes cruel and unusual punishment in violation of the Eighth Amendment as made applicable to the states by the Fourteenth.

A. The Constitutionality of the Death Penalty in General

The possible unconstitutionality of the death sentence in all cases is being increasingly asserted among legal writers,[4] not merely under the Eighth Amendment but as a denial of due process. Under the former it has been suggested that contemporary scientific knowledge, not available in 1791 but requiring judicial recognition,[5] establishes that all methods of execution of humans in use in the world today (hanging, shooting, beheading, stoning, electrocution and gas asphyxiation)[6] are physically and

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4. Rubin, *The Supreme Court, Cruel and Unusual Punishment, and the Death Penalty*, 15 CRIME AND DELINQUENCY 121 (1969); Marcus and Weisbrodt, *The Death Penalty Cases*, 56 CALIF. L. REV. 1268 (1968); Gottlieb, *Testing the Death Penalty*, 34 S. CALIF. L.R. 268 (1961).

5. *Cf. Brown* v. *Board of Education*, 347 U.S. 483 (1954).

6. Reckless, *The Use of the Death Penalty*, 15 CRIME AND DELINQUENCY 43, 46 (1969).

psychologically painful to the extent of being cruel and inhumane. Marcus and Weisbrodt, *The Death Penalty Cases*, 56 CALIF. L. REV. 1268, 1326-1343 (1968). It has been urged too that, as the then Attorney General of the United States stated in 1968, "Surely the abolition of the death penalty is a major milestone in the long road from barbarism,"[7] and that accordingly by contemporary standards this Court can and should declare capital punishment to be unconstitutionally cruel and inhumane in all cases. (See Point II of Brief *Amicus Curiae* of the N.A.A.C.P. Legal Defense and Educational Fund, Inc., and the National Office for the Rights of the Indigent in *Boykin* v. *Alabama*, 391 U. S. 510 (1968).)

It may also be suggested that, as will be indicated below pp. 35-37), actual consummation of the death penalty even when it is imposed has become so rare that *de facto* if not *de jure* it has become "unusual" within the context of the Eighth Amendment and that the Court should declare it so.

The due process argument has been predicated on the claim that execution of the death penalty renders due process of law inoperable. "When the condemned man is executed, errors in the proceedings are placed beyond the reach of later decisions that would provide new grounds for examining whether the proceedings leading to the execution contained error." Rubin, *The Supreme Court, Cruel and Unusual Punishment and the Death Penalty*, 15 CRIME AND DELINQUENCY 121, 130 (1969). Thus, for example, in *Witherspoon* v. *Illinois*, 391 U.S. 510 (1968) the Court held that a jury from which persons not believing in the death

7. Statement on S. 1760.

penalty were excluded was not representative of the community and therefore constitutionally impermissible. The Court held this principle to be retroactive and hence applicable to all persons in death rows all over the country. But as to those who have already been executed reopening and retrial is of course impossible and therefore the inevitable result is that they have been deprived of their lives without due process of law.

Finally, an argument has been made which encompasses both due process and the Eighth Amendment, an argument suggested by *Robinson* v. *California,* 370 U.S. 660 (1962), that the death penalty is not rationally related to any purpose that an American government may constitutionally seek to achieve. The traditional purposes of punishment have been retribution, deterrence, reform, and isolation for the protection of the community. *Rudolph* v. *Alabama,* 375 U.S. 889 (1963), dissenting opinion of Mr. Justice Goldberg; Holmes, THE COMMON LAW (Howe, ed.) 36 (1963). Retribution, it is asserted, is today no longer a valid governmental interest.[8] Capital punishment, as will be indicated more fully below, is overwhelmingly adjudged by competent students not to be demonstrably more effectual as a deterrent than life or long-term imprisonment. Reformation is of course impossible, and isolation can be effectively achieved by confinement. Gottlieb, *Testing the Death Penalty,* 34 S. CALIF. L. REV. 268 (1961); Sellin, THE DEATH PENALTY 69-79 (1959).[9]

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8. "There is no place * * * for punishment for its own sake, the product of vengeance or retribution." *People* v. *Oliver,* 1 N.Y. 2d 152, 160 (1956). See also Holmes, THE COMMON LAW (Howe, ed.) 37 (1963); Marcus and Weisbrodt, *The Death Penalty Cases,* 56 CALIF. L. REV. 1268, 1348-1354 (1968).

9. Of course, execution is more economical than life confinement, but in view of the sanctity of human life it can hardly be contended that this fact should be determinative.

It is not necessary in this case to consider the constitutionality of the death sentence in all cases and under all circumstances, nor even in all cases where the crime for which the condemned was convicted did not result in death. It is sufficient here to limit consideration and judgment to the constitutionality of the death sentence in the one specific case of rape where no death results, and it is to this alone that the present brief is addressed although, of course, all arguments directed at the constitutionality of capital punishment generally are applicable to the specific issue in the present case.

B. Applicability of the Eighth Amendment to the States

Whatever doubts may have previously existed,[10] it is now clear that the Eighth Amendment's prohibition of cruel and unusual punishments is applicable to the states by virtue of the Fourteenth Amendment. *Robinson* v. *California,* 370 U.S. 660, 666 (1962); *Gideon* v. *Wainwright,* 372 U.S. 335, 341-342 (1963); *Malloy* v. *Hogan,* 378 U.S. 1, 6 (1964).

C. Judicial Responsibility

Although, as will be indicated more fully below, there is a steady legislative trend toward the abolition of the death penalty either altogether or generally with a few exceptions (*infra,* p. 34-35), a trend which reflects the mandate of the public conscience, the ultimate responsibility of determining what constitutes cruel and unusual punishment within the meaning of the Eighth Amendment rests not with the legislature but with the courts, and particu-

10. See *Louisiana ex rel. Francis* v. *Resweber,* 329 U.S. 459, 462 (1947).

larly this Court. *Trop* v. *Dulles*, 356 U.S. 86, 103 (1958); *Robinson* v. *California*, 370 U.S. 660 (1962).

D. Excessive Punishment as Cruelty

Rather surprisingly it has been urged that the intent of the Eighth Amendment is solely to forbid cruel and inhumane methods of punishment such as torture or burning at the stake, but not to forbid punishments which are wholly disproportionate to the offense committed. *Weems* v. *United States*, 217 U.S. 349, 382 (1910) (dissenting opinion); Packer, *Making the Punishment Fit the Crime*, 77 HARV. L. REV. 1071, 1074-1075 (1964). This is surprising because it would forbid flogging a person who committed petty larceny[11] or even fining him excessively (since the Amendment specifically prohibits excessive fines),[12] but not imprisoning him for life or even hanging him for it.[13]

It is difficult to believe that the framers and adopters of the Amendment were concerned only about disproportionate monetary punishment but not other and more serious forms of disproportionate punishment.

In any event, the issue is no longer open to question; it is clear today that punishments which are excessively

11. *Jackson* v. *Bishop*, 404 F.2d 571 (1968).

12. The Eighth Amendment was taken bodily from the English Bill of Rights of 1688 (1 W. & M. s. 2, c. 2). The earliest application of the provision in England appears to have been in 1689, just a year after its adoption, in a case in which the King's Bench fined Lord Devonshire thirty thousand pounds for an assault and battery upon Colonel Culpepper. The House of Lords, in reviewing the case, took the opinion of the law Lords, and decided that the fine "was excessive and exorbitant, against Magna Charta, the common right of the subject and the law of the land." *Weems* v. *United States*, *supra*, 217 U.S. at 376.

13. See below footnote 21.

disproportionate to the crimes for which they are imposed are cruel and unusual within the meaning of the Amendment. *Weems* v. *United States*, 217 U.S. 349 (1910); *Robinson* v. *California*, 370 U.S. 660 (1962). It follows from this that even if the Court cannot find that there is no uncruel or humane method of execution of the death penalty[14] and is not prepared at present to hold that the death penalty is in all cases disproportionate to all crimes even those resulting in death, it can, and we submit should hold that it is unconstitutionally disproportionate to the crime of rape which does not result in death.

In discharging its responsibility of interpreting and applying the Eighth Amendment the Court is not confined to the standards prevailing in 1789 when the Amendment was framed. "[T]he words of the Amendment are not precise * * * their scope is not static." *Trop* v. *Dulles*, 356 U.S. at 100-101. Even when the Amendment was debated in Congress on its introduction it was recognized that future courts would give different meanings to the term "cruel." Representative Livermore opposed the Amendment for exactly that reason, stating:

> The clause seems to express a great deal of humanity, on which account I have no objection to it; but as it seems to have no meaning in it, I do not think it necessary. What is meant by the terms excessive bail? Who are to be the judges? What is understood by excessive fines? It lays with the court to determine. No cruel and unusual punishment is to be inflicted; it is sometimes necessary to hang a man, villains often

14. *Wilkerson* v. *Utah*, 99 U.S. 130 (1878) (statute authorized trial judge option of sentencing death by shooting, hanging or beheading; Court held shooting is not cruel and unusual); *In re Kemmler*, 136 U.S. 436 (1890) (death by electrocution not cruel and unusual). See also *O'Neil* v. *Vermont*, 144 U.S. 323 (1892).

> deserve whipping, and perhaps having their ears cut off; but are we, in future, to be prevented from inflicting these punishments because they are cruel? If a more lenient mode of correcting vice and deterring others from the commission of it could be invented, it would be very prudent in the legislature to adopt it, but until we have some security that this will be done, we ought not to be restrained from making necessary laws by any declaration of this kind. (Cong. Register 225, quoted in Weems v. United States, 217 U.S. at 369).[15]

Livermore spoke of cutting off the ears of criminals, but lest it be assumed that this was merely the product of his imagination, it should be noted that the Constitution itself, or more specifically the Fifth Amendment, appears to contemplate the acceptability of dismemberment as a method of punishment. The Amendment provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb,"[16] thus implying the propriety of being *once* put in jeopardy of limb. Blackstone refers to drawing and quartering, disemboweling, beheading, public dissection, burning at the stake, dismembering and branding as forms of punishment practiced in England, notwithstanding the Bill of Rights of 1688, up to a time contemporary with the framing of the Eighth Amendment.[17] Can

15. It is interesting to note that Livermore apparently anticipated a time when hanging, and presumably all other methods of executing the death penalty, would be adjudged unconstitutionally cruel.

16. Gottlieb, *Capital Punishment*, 15 CRIME AND DELINQUENCY 1, 20 (1969).

17. 2 Blackstone, COMMENTARIES, 2620-23 (Jones' ed. 1916). Whipping, held violative of the Eighth Amendment in *Jackson* v. *Bishop*, 404 F. 2d 571 (1968), was specifically prescribed as punishment for a variety of offenses in the first Federal Crimes Act. 1 Stat. 112-117.

it be doubted that no American court would today sanction these methods of punishment in the face of the Eighth Amendment?[18]

E. Inapplicable Standards of Cruelty.

As we have indicated, the Amendment addresses itself not only to the method of punishment but to its proportionateness as well. It no more immunizes from future judicial review punishment deemed in 1789 not to be disproportionate or excessive by the standards then prevailing than it immunizes punishments then acceptable in method or mode of execution. As late as 1837, more than twenty-five offenses, including stealing bank notes, forgery and bigamy were punishable by death in North Carolina.[19] In England, it was not until 1810 that the law making picking pockets a capital offense was repealed.[20] The Crimes Act of 1790 (1 Stat. 112-117), the first Federal penal code, made forging or passing forged public securities punishable by death.

It is inconceivable that this Court would today allow the death penalty to be imposed for these crimes although they were apparently acceptable to the generation that framed and adopted the Eighth Amendment. That Amendment did not fossilize forever the standards of humane conduct prevailing in the 18th century. The matter has been well put by the Court in *Weems* v. *United States* (217 U.S. at 373):

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18. See, *Wilkerson* v. *Utah*, 99 U.S. 130, 135-136 (1878).

19. Bedau, 7. This harsh code persisted so long in North Carolina partly because the state had no penitentiary and thus had no suitable alternative to the death penalty. *Ibid.*

20. *Ibid.*

> Legislation, both statutory and constitutional, is enacted, it is true, from an experience of evils, but its general language should not, therefore, be necessarily confined to the form that evil had theretofore taken. Time works changes, brings into existence new conditions and purposes. Therefore a principal to be vital must be capable of wider application than the mischief which gave it birth. This is peculiarly true of constitutions. They are not ephemeral enactments, designed to meet passing occasions. They are, to use the words of Chief Justice Marshall, "designed to approach immortality as nearly as human institutions can approach it." The future is their care and provision for events of good and bad tendencies of which no prophecy can be made. In the application of a constitution, therefore, our contemplation cannot be only of what has been but of what may be. Under any other rule a constitution would indeed be as easy of application as it would be deficient in efficacy and power. Its general principles would have little value and be converted by precedent into impotent and lifeless formulas. Rights declared in words might be lost in reality. And this has been recognized. The meaning and vitality of the Constitution have developed against narrow and restrictive construction. * * *

The conclusion to be drawn from this is that the fact that death was deemed a constitutionally acceptable penalty for rape in 1789 when the Eighth Amendment was framed, or 1868 when the Fourteenth Amendment was adopted or even in 1947 when *Louisiana ex rel. Francis v. Resweber* was decided by this Court, does not require the Court to hold today that it is constitutionally acceptable and not violative of the Eighth Amendment. As the Court said in *Weems* (217 U.S. at 378), "The clause of the Constitution

* * * may therefore be progressive, and is not fastened to the obsolete, but may acquire meaning as public opinion becomes enlightened by a humane justice."

Nor is the Court precluded from adjudging the death penalty for non-homicidal rape to be unconstitutionally excessive by reason of the fact that the legislature has expressly or implicitly found it to be efficacious as a deterrent. As we will show below (p. 25), the scientific evidence is almost unanimously to the contrary; but even if that were not so, the Eighth Amendment does not except from its prohibition such cruel and inhumane punishment as effectively deters others from committing the same crime. If it did, there would be nothing left of the Amendment, for the more cruel the punishment the more effective it would be as a deterrent. Concededly, the state has an interest in deterring rape. But so too does it have an interest in deterring forgery, embezzlement, petty larceny and even traffic violations, and that interest would hardly constitutionally justify imposition of the death penalty for those offenses.[21]

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21. "But, indeed, were capital punishments proved by experience to be a sure and effectual remedy, that would not prove the necessity * * * of inflicting them upon all occasions when other expedients fail. I fear this reasoning would extend a great deal too far. For instance, the damage done to our public road by loaded wagons is universally allowed, and many laws have been made to prevent it; none of which have hitherto proved effectual. But it does not therefore follow that it would be just for the legislature to inflict death upon every obstinate carrier who defeats or eludes the provisions of former statutes * * *" 2 Blackstone's *Commentaries*, 2164-65. (It should be noted, incidentally, that this quotation effectively disposes of the claim that the term "cruel and unusual" as used in the Bill of Rights of 1688 contemplated only the method of punishment and not its excessiveness.)

Today, 17 states and the District of Columbia maintain in their statutes the death penalty for rape.[22] All but one (Nevada) are southern states.[23] The death penalty for rape can therefore truly be said to be a regional or geographic phenomenon. But, we submit, a geographic or regional variation cannot restrict the Court's exercise of judgment in construing and applying the Eighth Amendment any more than can the First or Fourteenth. Indeed, whether or not it was the intent of the framers of the latter amendment to incorporate the first ten,[24] the practical effectuation of the same result through the steady process of selective incorporation initiated in *Gitlow* v. *New York*,[25] manifests a strong judicial policy towards nationalizing the Bill of Rights. During the quarter of a century since *Gitlow*, the personnel of the Court has undergone many changes; it has included such staunch defenders of federalism as Mr. Justice Frankfurter. Yet, during the entire *period the progress* towards nationalization has not been stayed and certainly not been reversed; not a single decision holding applicable to the states by virtue of the Fourteenth Amendment a right secured in the first ten has been overruled by

22. The states are Alabama, Arkansas, Delaware, Florida, Georgia, Kentucky, Louisiana, Maryland, Mississippi, Missouri, Nevada, North Carolina, Oklahoma, South Carolina, Tennessee, Texas and Virginia. Bedau, p. 43; United Nations Report, Capital Punishment (ST/SOA/SD/9-10), p. 40 (hereinafter referred to as UN Report). The latter includes West Virginia but in 1965, after the UN compilation, that state abolished capital punishment in all cases. United States Department of Justice, National Prisoner Statistics, No. 42, June, 1968, p. 32 (hereinafter referred to as NPS). In Nevada, rape is punishable by death only where committed with substantial bodily harm to the victim. Nev. Rev. Stat. Sec. 200.363 (1967).

23. So classified by the Department of Justice. NPS, p. 9.

24. See *Adamson* v. *California*, 332 U.S. 46 (1947) (opinion by Mr. Justice Reed, concurring opinion by Mr. Justice Frankfurter and dissenting opinion by Mr. Justice Black).

25. 268 U.S. 652 (1925).

the Court or even modified to the extent of according greater liberality to the states in interpreting the scope of the right.[26]

The principle underlying *Gitlow* and its successors is that we are one indivisible nation with liberty and justice for all, and not merely for those fortunate enough to reside in some rather than other regions of the country. It is the principle that where the fundamental freedoms of the Bill of Rights are concerned (one of which is the freedom from cruelly excessive punishments) accidents of geography are irrelevant. So long as we are one nation, it is unacceptable that the right of a man, even a rapist, to live should depend on whether he committed the offense five feet north or five feet south of the Mason-Dixon line.

It is not merely in the many incorporation cases that the judicial policy negating geographical factors in applying constitutional freedoms is manifest. In *Brown* v. *Board of Education, supra,* the Court held that a Negro child attending public school in Topeka, Kansas has as much right not to be segregated as his cousin attending school in Denver or Minneapolis. In *Loving* v. *Virginia,* 388 U.S. 1 (1967), it held that the right of a Negro and white to marry each other is not dependent on whether they live in Richmond or in New York.

The thrust of *Baker* v. *Carr,* 369 U.S. 186 (1962) and its manifold progeny is that not only the right to vote but the value of one's vote may not be made dependent upon the

26. As suggested by Mr. Justice Jackson in *Beauharnais* v. *Illinois,* 343 U.S. 250, 288-295 (1952) and Mr. Justice Harlan in *Roth* v. *United States,* 354 U.S. 476 (1957).

geographical accident of whether he lives on a farm or in a city.

Perhaps most germane is *Jacobellis* v. *Ohio*, 378 U.S. 184 (1964). In *Roth* v. *United States*, 354 U.S. 476, 489 (1957), this Court had held that the test for constitutionally unprotected obscenity is "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interests." In *Jacobellis*, the Court held that the term "community standards" does not imply a determination of the constitutional question of obscenity in each case by the standards of the particular community from which the case arises, but that it refers to national rather than local standards. What the Court said in *Jacobellis* is, we submit, particularly relevant here (378 U.S. at 194-5):

> It is true that local communities throughout the land are in fact diverse, and that in cases such as this one the Court is confronted with the task of reconciling the rights of such communities with the rights of individuals. Communities vary, however, in many respects other than their toleration of alleged obscenity, and such variances have never been considered to require or justify a varying standard for application of the Federal Constitution. The Court has regularly been compelled, in reviewing criminal convictions challenged under the Due Process Clause of the Fourteenth Amendment, to reconcile the conflicting rights of the local community which brought the prosecution and of the individual defendant. Such a task is admittedly difficult and delicate, but it is inherent in the Court's duty of determining whether a particular conviction worked a deprivation of rights guaranteed by the Federal Constitution. The Court has not shrunk

> from discharging that duty in other areas, and we see no reason why it should do so here. The Court has explicitly refused to tolerate a result whereby "the constitutional limits of free expression in the Nation would vary with state lines," Pennekamp v. Florida, supra, 323 U.S., at 335, we see even less justification for allowing such limits to vary with town or county lines. We thus reaffirm the position taken in Roth to the effect that the constitutional status of an allegedly obscene work must be determined on the basis of a national standard. *It is, after all, a national Constitution we are expounding.* (Emphasis added.)

If a community may not determine for itself what is obscene, it may not determine what is cruel and unusual. If restrictive local or regional standards may not determine the right of an American to speak, it certainly may not, we submit, determine his right to live.

It may be conceded that these decisions as well as one that forbids a state to impose the death penalty for rape impinge somewhat upon federalism strictly construed. But federalism, like government, is not an end but a means. We declared our independence of England because we believed that governments are instituted among men to secure their inalienable rights, of which first and foremost is the right to live, and that when a particular form of government fails to secure these rights, it is the form of government and not the rights which must yield.

It is no answer to say that application to particular geographic regions of national concepts of the meaning of freedoms secured by the Bill of Rights should be effected by constitutional amendment rather than court decision,

for it is the teaching of all the post-*Gitlow* decisions that this indeed is what was done in 1868. If the Fourteenth Amendment means anything, it means that a man's right to life or liberty cannot be made dependent upon local or regional standards but must be judged according to the standards of the entire nation. It is, after all, a national Constitution which secures this right.

F. Applicable Standards of Cruelty

As we have indicated, the ultimate authority to determine what constitutes constitutionally impermissible punishment rests with the courts. This is so because in a Federal system based upon a written constitution there must be some single agency which has the final responsibility of determining for the whole nation the meaning of that constitution. Ever since *Marbury* v. *Madison*, 1 Cranch 137 (1803), it has been established that this responsibility has been delegated to the judiciary. It is therefore the responsibility of this Court to adjudicate the appropriateness of the death penalty for rape.

In discharging this responsibility, members of the Court are not left without guides other than their own subjective predispositions. We do not urge the Court to reverse in the present case merely because its members may not like the idea of a person being put to death for a non-homicidal rape. We do not even urge that the penalty be adjudged unconstitutional because the Court deems it shocking to the conscience, although there is ample authority for this.[27] We believe that there are standards or criteria available

27. See, e.g., *Rochin* v. *California*, 342 U.S. 165 (1952); *Louisiana ex rel. Francis* v. *Resweber*, 329 U.S. 459, 471 (1947) (concurring opinion of Mr. Justice Frankfurter).

to the Court as reasonably objective as can be expected of a constitutional provision whose words necessarily "are not precise."[28]

We have heretofore urged rejection of such criteria as acceptability in 1789 or 1868, effectiveness as a deterrent, and contemporary acceptability in a particular geographic region. There are, however, other standards or criteria which are appropriate and it is to these that we now address ourselves.

Preliminarily, we note that the over-all principle was expressed by Mr. Chief Justice Warren in his plurality opinion in *Trop* v. *Dulles* (256 U.S. at 101). "The Amendment," he said, "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." The criteria we now propose will, we submit, aid the Court in determining whether the death penalty for non-homicidal rape is consistent with these "evolving standards of decency."

1. The cruelty of non-deterrent punishment

We have pointed out above (p. 16) that punishment may be constitutionally cruel even if it is effective as a deterrent and that accordingly if the death penalty were effective to deter rapes it nevertheless could still be violative of the Eighth Amendment. But, we suggest here, the converse does not follow; punishment which does not deter and does not serve any valid purpose at all (such as reformation) or any valid purpose which cannot effectively be served by less harsh means (such as isolation) is, we

28. *Trop* v. *Dulles*, 356 U.S. at 100.

submit, cruel and inhumane. This is so because its only purpose is vengeance,[29] and vengeance is forbidden by the Constitution.

Mr. Justice Brennan did not join in the Chief Justice's plurality opinion in *Trop* v. *Dulles*, but he expressed this principle well in his own concurring opinion. After con-

29. There is considerable empiric evidence to support the belief that vengeance is the purpose of the death penalty. Prison authorities uniformly search and guard condemned prisoners closely to prevent suicide. Should a prisoner in attempting suicide injure himself, no medical effort is spared to keep him alive for the scheduled execution. Gottlieb, *Capital Punishment*, 15 CRIME AND DELINQUENCY 8 (1969). It is apparently not the prisoner's death but the putting him to death that the state demands. Moreover, the prisoner must be conscious and sane at the time of the execution. Dr. William F. Graves, for many years medical officer at San Quentin, made some fifty visits on death row, examining each condemned inmate to determine his physical and mental status and to recommend any treatment that might be needed to keep him alive and sane for execution. Dr. Graves reports as follows regarding one condemned prisoner: "During his stay in Death Row, McCracken became no more than a vegetable. On one occasion, I found him wallowing on the floor of his cell in his own excreta babbling incoherently. I arranged to have him transferred to the prison hospital where he was given electric shock therapy—this to bring him to a point of sanity at which he might be considered able to understand that he was being punished at the time of his execution." *Ibid.*

That this practice is not limited to the United States is shown by the following from the UN report cited above (at p. 101): "There are provisions in the laws of many countries which allow the postponement of an execution in the event of either serious physical illness or insanity which appears after sentencing; the execution then takes place when the condemned man is in good health. Ironically, this practice sometimes results in the fact that the state expends considerable effort and funds to save the life of the man it will then proceed to kill. * * *" All this makes sense only in terms of vengeance; the culprit must be sane and conscious when the state puts him to death, else the state's vengeance would not be full.

The practice in ancient Israel, during the time when capital punishment was still effected, was the reverse. The condemned prisoner was given wine spiced with frankincense to drink in order to benumb his senses. *Talmud, Sanhedrin* 43a.

cluding that denationalization for desertion during wartime is ineffective as a deterrent, he stated (356 U.S. at 112):

> * * * It cannot be denied that there is implicit in this a certain rough justice. He who refuses to act as an American should no longer be an American—what could be fairer? But I cannot see that this is anything other that forcing retribution from the offender—naked vengeance. * * *

Mr. Justice Brennan did not join in the plurality opinion based on the Eighth Amendment presumably because the Government had "understandabl[y] * * * not pressed its case on the basis of expatriation of the deserter as punishment for his crime." (*Ibid.*) Had it done so, the tenor of his opinion and his joinder in the Court's opinion in *Robinson* v. *California, supra,* indicate quite clearly that he would likewise have held that non-deterrent, vengeful punishment is violative of the Eighth Amendment's prohibition of cruel and unusual punishment.

Mr. Justice Brennan pointed out in *Trop* that because of the novelty of expatriation as punishment no one can judge its precise consequences and he accordingly could not rely on any studies to establish its inefficacy as a deterrent.[30] Nevertheless, he concluded that since its efficacy had not been established, so grave a penalty could not constitutionally be imposed by Congress.

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30. He did, however, note that, from the fact that in two-thirds of the cases of the 21,000 soldiers convicted of desertion during World War II and sentenced to be dishonorably discharged, reviewing authorities remitted the dishonorable discharges, "it is possible to infer that the military itself had no firm belief in the deterrent effects of expatriation." 358 U.S. 112, n. 8.

In respect to capital punishment, however, substantial studies have been made by competent scholars and their conclusion is overwhelming that statistical research does not support the assumption that the death penalty is more effective as a deterrent than life or long-term imprisonment and that it is the certainty rather than the gravity of the punishment that is critical in deterrence.[31] (Indeed, the only contrary assertions are unsupported, impressionistic statements mainly from law enforcement officials.[32]) Some of the scholars assert flatly that the death penalty, as distinguished from imprisonment, is not a deterrent;[33] or may even have a contrary effect and actually incite commission

31. Sellin, *The Death Penalty*, 19-63 (1959); Sellin, *Capital Punishment*, 135-186 (1967); Calvert, *Capital Punishment in the Twentieth Century*, 51-90 (1928); Mattick, *The Unexamined Death*, 8-28 (1966); Koeninger, *Capital Punishment in Texas*, 1924-1968, 15 CRIME AND DELINQUENCY (1969) 132; Sellin, *Does the Death Penalty Protect Municipal Police?* in Bedau, 284; Campion, *Does the Death Penalty Protect State Police?* in *ibid.* 301; Savitz, *The Deterrent Effect of Capital Punishment in Philadelphia*, in *ibid.*, p. 315; Graves, *The Deterrent Effect of Capital Punishment in California*, *ibid.*, p. 322; Royal Commission on Capital Punishment, *Report* (1953), sections 65, 67-68; Reckless, *The Use of the Death Penalty*, 15 CRIME AND DELINQUENCY 52-56 (1969); McCafferty, *Major Trends in the Use of Capital Punishment*, FEDERAL PROBATION, Sept. 1961, pp. 15-21.

32. Hoover, *Statements in Favor of the Death Penalty*, in Bedau, 130; Allen, *Capital Punishment: Your Protection and Mine*, *id.*, 135. But not all law enforcement officials agree. See, e.g., Statement of Attorney General Ramsey Clark on S. 1760, Dept. of Justice Release, July 2, 1968. Correction officials, moreover, appear very predominantly to be of the opinion that capital punishment has no significant deterrent effect; Thomas, *Attitudes of Wardens Towards the Death Penalty*, in Bedau, 242; Gottlieb, *Capital Punishment*, 15 CRIME AND DELINQUENCY 13 (1969).

33. Professor Sellin, for example, has asserted positively that there is evidence for the view that imprisonment is as good a deterrent as the death penalty. Bedau, 264. So too has Koeninger, *Crime and Punishment in Texas*, 15 CRIME AND DELINQUENCY 132, 141 (1969) ("The death penalty for murder in Texas has not been a deterrent.")

of the very crime it seeks to deter.[34] More cautious scholars say only that there is no evidence to support the theory that the death penalty is a deterrent superior to imprisonment.[35] But even accepting the latter view, we submit, in harmony with Mr. Justice Brennan's position in *Trop v. Dulles*, that where the consequences of a choice of penalties is so grave, the Constitution requires some evidence to support the choice made and does not sanction the staking of a man's life on a guess.

In sum, we submit that in the absence of at least some convincing evidence that the death penalty for rape does actually deter other rapes to an extent greater than life or long term imprisonment, the death penalty constitutes cruel and unusual punishment in violation of the Eighth Amendment.

2. *The death penalty for rape as a badge of slavery*

Every relevant study indicates a strong relation between the death penalty and poverty; for the crime that sends the poor man to the death chamber, the well-to-do, if convicted at all, is most likely to go to prison. Dean Macnamara of the New York Institute of Criminology was perhaps over-dramatic in stating that "It may be exceedingly difficult for a rich man to enter the Kingdom of Heaven but case after case bears witness that it is virtually impos-

34. Sellin, *The Death Penalty* (1959), 65-69; Scott, *A History of Capital Punishment* (1950), p. 246; Massachusetts, Report on the Death Penalty (1958), 27-28; Ohio, *Report on Capital Punishment* (1961), 89; Roche, *A Psychiatrist Looks at the Death Penalty*, The Prison Journal (Oct. 1958), p. 47.

35. See authorities cited in footnote 25. Reckless sums it up as follows: "What do all these studies, taken together, seem to show? The results are negative; there is no evidence to support the theory that the death penalty is a deterrent superior to imprisonment *for the crime of murder*" (p. 364).

sible for him to enter the execution chamber,"[36] but the substantial truth of the statement is supported by all the authorities,[37] and is conceded even by those favoring retention of capital punishment.[38]

The death penalty is not only a function of poverty, it is also a function of race. There is substantial evidence and agreement among the authorities that racial discrimination is a significant factor in the imposition and execution of the death sentence.[39] Attorney General Ramsey Clark

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36. Macnamara, STATEMENT AGAINST CAPITAL PUNISHMENT, in Bedau, 188. See also, Ehrmann, THE HUMAN SIDE OF CAPITAL PUNISHMENT, in Bedau, p. 510. "It is difficult to find cases where persons of means or social position have been executed. Defendants indicted for capital offenses who are able to employ expert legal counsel throughout their trials are almost certain to avoid death penalties. In the famous Finch-Tregoff case in California, there were three trials, two hung juries, and finally verdicts of guilty but *without* the death penalty. It is estimated that the cost of these trials was over $1 million. But in the trial of some defendants without funds, juries have deliberated for as little as nineteen minutes, or an hour more or less, and then returned verdicts of guilty and death."

37. Duffy and Hirshberg, 88 MEN AND WOMEN (1962), p. 258; LaSalle, *Capital Punishment and Clemency*, 25 OHIO STATE L. J. 71, 72 (1964); Bedau, *Death Sentences in New Jersey 1907-1960*, 19 RUTGERS L. REV. 1 (1964); Johnson, *Selective Factors in Capital Punishment*, 36 SOCIAL FORCES 165 (1957); Koeninger, *Capital Punishment in Texas, 1924-1968*, 15 CRIME AND DELINQUENCY 141 (1969); Statement of Attorney General Ramsey Clark on S. 1760, July 2, 1968; Wolfgang, Kelly and Nolde, EXECUTIONS AND COMMUTATIONS IN PENNSYLVANIA, in Bedau, 482-483; Ehrmann, THE HUMAN SIDE OF CAPITAL PUNISHMENT, in Bedau, 510-511; Mulligan, *Death, The Poor Man's Penalty*, THE AMERICAN WEEKLY, May 15, 1960, p. 9.

38. E.g., Allen, CAPITAL PUNISHMENT: YOUR PROTECTION AND MINE, in Bedau, 138.

39. Wolfgang, Kelly and Nolde, EXECUTIONS AND COMMUTATIONS IN PENNSYLVANIA, in Bedau, 473-477; Macnamara, Statement Against Capital Punishment, in *ibid* 188; Murton, *Treatment of Condemned Prisoners*, 15 CRIME AND DELINQUENCY 320, (1969); Gottlieb, *Research Note on Inter- and Intra-Racial Homicides*, 20 SOCIAL FORCES 361 (1959); Johnson, *The Negro and Crime*, 271 Annals 93 (1951). See also authorities cited in footnote 31, *supra*.

stated quite categorically in testifying before the Senate Subcommittee of the Judiciary on S. 1760 (July 2, 1968) that "racial discrimination occurs in the administration of capital punishment." By no means untypical is the following finding in a study of capital punishment in Texas: "In several instances where a white and a Negro were co-defendants, the white was sentenced to life imprisonment or a term of years, and the Negro was given the death penalty."[40]

The positive relationship between the death penalty and race is strong, but where the crime involved is rape and more particularly, as in the present case, the rape of a white woman by a Negro, the relationship is almost uncontrovertible. The statistics of the Department of Justice show that in the United States in the period from 1930 to 1967 the percentage of whites and Negroes among those executed was, respectively, for murder, 49.9 and 48.9; for crimes other than murder and rape, 55.7 and 44.3; *for rape, 19.6 and 89.1*.[41]

In 1954, the Court in *Brown* v. *Board of Education*, *supra*, declared racial segregation in the public schools to be unconstitutional. In 1962, the petitioner herein was condemned to death for the rape of a white woman. A comparison of the states whose statutes in 1954 required or authorized racial segregation in the schools and those

40 Koeninger, *Capital Punishment in Texas, 1924-1968*, 15 Crime and Delinquency 141 (1969).

41 NPS, p. 7. An independent study made of Texas for the years 1924 to 1965 shows for murder the relative percentage of whites and Negroes were respectively 46 and 55, while for rape, they were 11 and 83. Koeninger, *Capital Punishment in Texas, 1924-1968*, 15 Crime and Delinquency 140 (1969).

which in 1962 authorized[42] the death penalty (and with the exception of West Virginia still do) for rape is, we believe, of great significance:

Segregation States[43]	*Death Penalty States*[44]
Alabama	Alabama
Arizona	
Arkansas	Arkansas
Delaware	Delaware
District of Columbia	District of Columbia
Florida	Florida
Georgia	Georgia
Kansas	
Kentucky	Kentucky
Louisiana	Louisiana
Maryland	Maryland
Mississippi	Mississippi
Missouri	Missouri
	Nevada
New Mexico	
North Carolina	North Carolina
Oklahoma	Oklahoma
South Carolina	South Carolina
Tennessee	Tennessee[45]
Texas	Texas
Virginia	Virginia
West Virginia	West Virginia
Wyoming	

42. In no state is the death sentence for rape mandatory; otherwise a white charged with rape would have to be either acquitted or, as rarely happens, be sentenced to death. See Bedau, p. 413.

43. Murray, STATES LAWS ON RACE AND COLOR, Supp. (1955), p. 6.

44. *Supra*, note 22.

45. In 1915, Tennessee abolished capital punishment for all crimes *except rape*. Bedau, p. 413.

With the exception of Nevada (where the death penalty is permissible only if the rape is accompanied by substantial bodily harm to the victim[46] and where in any event the statute is a dead letter, no person having been executed under it at least since 1930)[47] *every state (including the District of Columbia) which authorizes the death penalty for rape required or authorized racial segregation in the public schools until it was declared unconstitutional.* Conversely, of the 22 states which required or authorized racial segregation in the public schools, all but three (Arizona, Kansas and Wyoming) authorized the death penalty for rape.

This almost one for one relationship between racial segregation and death penalty statutes for rape as well as other statistical and empiric evidence, can be explained in no other way than in terms of racial discrimination. This is the practically unanimous conclusion of the competent scholars who have studied the problem.[48] Thus, Koeninger, reporting on a Texas study, asserts: "The Negro convicted of rape is far more likely to get the death penalty than a term sentence, whereas the whites and Latins are far more likely to get a term sentence than the death penalty."[49] Bedau states (at p. 413) that

> * * * as the *National Prison Statistics* shows of the nineteen jurisdictions that have executed men for rape since 1930, a third of them have executed only Negroes.

46. *Supra*, note 22.

47. NPS, p. 11.

48. Bedau, p. 60; Ehrmann, THE HUMAN SIDE OF PUNISHMENT, in Bedau, p. 511. See also authorities cited in note 39, *supra*.

49. 15 CRIME AND DELINQUENCY 141 (1969).

> In these six states, the very existence of rape as a crime with optional death penalty is, in the light of the way it has been used, a strong evidence of an original intent to discriminate against non-whites.

At the request of the NAACP Legal Defense and Education Fund, Professor Marvin E. Wolfgang undertook an independent investigation of the relationship of the death penalty to race in rape cases. Dr. Wolfgang's findings, which accorded with those of all the other scholars, were presented to the District Court in this case in support of a claim of denial of equal protection, but that court and the Court of Appeals were unpersuaded, primarily because the study did not encompass the particular county (Garland) wherein the present case was tried. The courts apparently believed that the fact that juries in other counties act discriminatorily in imposing the death sentence does not justify an inference that the jury in the present case followed the general pattern.

In view of the limited nature of the certiorari allowed in this case, the equal protection question and the correctness of the decision of the lower courts on that specific question are not now open to review. Petitioner, however, offers Dr. Wolfgang's findings to this Court on another ground which is before it, namely, that unbridled discretion on the part of a jury in fixing the penalty for rape usually if not inevitably results in racial discrimination and hence is arbitrary and a deprivation of due process.

We offer Dr. Wolfgang's findings as well as the statistical and other scholarly studies to this Court on an analogous but somewhat different basis. We suggest that if a

white man found guilty of rape is rarely sentenced to death, or if sentenced is rarely executed, then the death sentence for a Negro convicted of the same crime may truly be said to be an "unusual" punishment, and hence violative of the Eighth Amendment. We suggest too another approach. In *Robinson* v. *California, supra*, the Court held that to punish a person for a status (drug addiction) which he cannot control violates the Eighth Amendment.[50] The same reasoning makes violative of the Amendment the imposition on a person of a penalty harsher than ordinarily imposed simply because of a status (the color of his skin) which he cannot control.

It is true, of course, that neither the Wolfgang study nor the National Prisoner Statistics or the scholarly studies which have been cited herein specifically pinpoint Garland County in Arkansas, and it is conceivable that the jury which condemned the petitioner to death did not share the general feelings regarding the rape of a white woman by a Negro prevalent in all the states which authorize the death penalty for rape. But the Constitution does not require the courts to ignore what everyone knows or to close their eyes to what everyone sees. Certainly, when human life is at stake the courts have not merely the right but an obligation to act on the basis of probability rather than remote possibility.

In *Brown* v. *Board of Education, supra*, the Court in holding racial segregation in *all* schools to be unconstitu-

50. In *Powell* v. *Texas*, 392 U.S. 514 (1968), the Court found an absence of evidence in the record to support the claim that being drunk in a public place was a status entirely uncontrollable by the defendant, but in no way impaired the authority of *Robinson*.

tional relied upon scholarly studies that such segregation causes psychological harm to Negro children. Yet, none of the cited studies pinpointed Topeka, Kansas, nor was any other evidence presented to show that the Negro children in that school district suffered any hurt from the compulsory segregation. The Court had held at least a *prima facie* denial of equal protection on the basis of statistical evidence of the exclusion of minority groups from juries even though there was no evidence that the particularly all-white jury which convicted the defendant whose case was being considered was motivated by racial considerations.[51]

The genius of the Anglo-American system of law is that in a criminal case every reasonable doubt must be resolved in favor of the accused. This is especially true where a human life is at stake. Here far more than a reasonable doubt is present that the petitioner's death sentence was unmotivated by racial considerations. This should be more than enough to bar the extinguishment of his life.

3. The death penalty and the national conscience

We have suggested (*supra*, pp. 17-21) that local or regional standards are not the appropriate measure to determine whether the death penalty constitutes cruel and unusual punishment within the purview of the Eighth Amendment, and that fundamental rights secured by a national constitution must be applied nationally. We submit that viewed nationally "the evolving standards of decency that mark the progress of a maturing society"[52] clearly point to the elimination of the death penalty in the United States.

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51. See, e.g., *Hernandez* v. *Texas*, 347 U.S. 475 (1954).

52. *Trop* v. *Dulles*; 256 U.S. at 101.

Although general public opinion has fluctuated over the years, the trend is strongly toward abolition. Where informed public opinion is concerned, opposition to capital punishment is overwhelming (with the exception of professional law enforcement officials, but not correction officials). Bedau (at p. 236) summarizes the public opinion and attitude surveys as follows:

> * * * It seems fairly probable that: (1) psychiatrists, penologists and possibly social scientists and social workers generally, as well as higher government officials, tend to oppose the death penalty in this country at this time; law enforcement officers tend to favor it. The strength of these divergent attitudes is about equally pronounced. The general public shows a steadily growing trend to doubt the death penalty and to favor abolishing it. * * *

Better than any other agency in a society its religious groups reflect its conscience. The six constituents of the Synagogue Council of America, in whose behalf this brief is submitted, can fairly be said to represent American Judaism, and all favor abolition of capital punishment. Some of the others in the rapidly growing number of religious groups on record as opposed to capital punishment are: American Baptist Convention; American Evangelical Lutheran Church; Augustana Evangelical Lutheran Church of North America; California-Nevada Conference of Methodists; Christian Churches (Disciples of Christ) International Convention; Church of the Brethren; Church Federation of Greater Chicago; Congregational Conference of Southern California and the Southwest; Connecticut Valley Presbytery; Connecticut Valley Quarterly Meeting of Friends (Quakers); Connecticut Universalist

Convention; Greater Red Bank Area Council of Churches; Massachusetts Baptist Convention; Massachusetts Council of Churches; New York State Council of Churches; Northern California and Nevada Council of Churches; Protestant Episcopal Church in the United States of America; Protestant Episcopal Church, Diocese of Massachusetts; Southern California Council of Churches; Southern California-Arizona Conference of the Methodist Church; United Presbyterian Church in the United States of America-General Assembly; Universalist Church of America.[53]

Legislative action reflects this trend. In the past five years, five states (Iowa, New York, Oregon, West Virginia and Vermont) have abolished the death penalty.[54] In addition, the United States Department of Justice has urged Congress to abolish the death penalty in places under its jurisdiction.[55] But the statute books do not tell the full story. Nevada, as we have noted, has never legislatively abolished the death penalty for rape; yet not a single person has been executed in that state for rape in at least forty years. There is hardly a state in the Union which does not carry on its books laws which have long become archaic and obsolete. In gauging standards, the *de facto* is more significant than the *de jure*.[56]

An examination of what actually has been happening shows clearly that the death penalty has really become an

53. Ehrmann, THE HUMAN SIDE OF CAPITAL PUNISHMENT, in Bedau, pp. 515-516. This listing is far from exhaustive.

54. Bedau, p. 12.

55. Statement by Attorney General Ramsey Clark on S. 1760 (July 2, 1968).

56. *Cf. Poe* v. *Ullman*, 367 U.S. 497 (1961).

"unusual" punishment. The number of persons executed within the United States in the years 1930, 1940, 1950 and from 1960 to the present as reported by the Federal Bureau of Prisons[57] are shown in the following table:

1930—155
1940—124
1950— 82
1960— 56
1961— 42
1962— 47
1963— 21
1964— 15
1965— 7
1966— 1
1967— 2
1968— 0
1969— 0

It is true that some of the decrease may be explained by decisions of this Court[58] and the activities of such organizations as the NAACP Legal Defense and Educational Fund and the National Office for the Rights of the Indigent seeking to make available to poor persons some of the legal services available to the well-to-do, so that some who earlier would have gone to the death chamber with little legal opposition are now better able to use the law to preserve their lives. It is also true that, as of the beginning of 1968, there were 435 persons on death rows throughout the nation[59] and that since then many additional death

57. NPS, p. 7 (updated).

58. E.g., *Griffin* v. *Illinois*, 351 U.S. 12 (1956); *Gideon* v. *Wainwright*, 372 U.S. 335 (1963).

59. NPS, p. 13.

sentences have been handed down, so that in the event the present appeal and others that are on their way to this Court are unsuccessful some of these persons will be executed. Nevertheless, the steady decline in the number of persons executed during the past four decades can be explained only in terms of a widely held belief that the death penalty is basically cruel and morally unacceptable.

The conclusions drawn in this section and the statistical and other factual information cited to support them all deal with the death penalty generally, that is even for premeditated murder. We do not in this brief urge a decision that capital punishment is in all cases cruel and unusual punishment violative of the Eighth Amendment. We urge only that the death penalty for non-homicidal rape does violate the Constitution. In considering this narrower issue, it should be noted that, even if measured by what the statute books say rather than by what is actually done, the national standard quite clearly rejects capital punishment for rape; the overwhelming majority of Americans live in states whose laws do not permit a judge or jury to sentence a person convicted of rape to death. Measured by the test set forth in *Trop* v. *Dulles,* this Court, we submit, can come to no other conclusion than that the time has arrived judicially to declare that the death penalty for non-homicidal rape does not comport with the present standards of national decency and therefore is violative of the Eighth Amendment.

4. International standards

A democracy, our Declaration of Independence asserts, imposes upon its people an obligation to accord a decent respect to the opinions of mankind. We suggest that in

deciding whether capital punishment for rape is consistent with evolving standards of decency, this Court can and should accord respect to the opinion of mankind. This is by no means unprecedented. In *Trop* v. *Dulles*, Mr. Chief Justice Warren noted that "The civilized nations of the world are in virtual unanimity that statelessness is not to be imposed as punishment for crime." 356 U.S. at 102. He referred to a United Nations' survey of the nationality laws of 84 nations of the world which revealed that only two countries, the Phillippines and Turkey, imposed denationalization as a penalty for desertion, and at least partly on the basis of this fact he held denationalization to constitute cruel and unusual punishment. 356 U.S. at 103.

What is true of denationalization is equally true at least in respect to capital punishment for non-homicidal rape.

We have quoted Bedau's summary of American attitudes to the death penalty generally.[60] World opinion, as indicated in a survey made under the auspices of the Department of Economic and Social Affairs of the United Nations, is almost exactly the same. The UN reports as follows:[61]

> In the first place, it will be noted that, among the leading authorities in penal science, the supporters of abolition appreciably outnumber those who favor the retention of capital punishment. The specialists of the social sciences, criminologists, sociologists, penologists, psychologists, doctors and writers on social

60. *Supra*, p. 34.

61. UN Report, p. 64. See, also, Ancel, *Capital Punishment in the Second Half of the Twentieth Century*, The Review (International Commission of Jurists), June 1969, 33.

science and criminology are, in their great majority, abolitionists. The supporters of capital punishment, apart from a number of political figures and persons holding high public office, are generally jurists with a traditional training and judges.

It should be noted that here too the reference is to capital punishment generally, even for premeditated murder. When capital punishment for non-homicidal rape is involved, world revulsion is even clearer. The United Nations' survey shows that of the sixty-five nations that responded to its inquiries, only four (other than the seventeen states in the United States cited above)[62] still permit imposition of the death penalty for rape.[63] There is, we suggest, significance in the identity of the four which still maintain the death penalty for rape. The four are the Republic of China, Northern Rhodesia, Nyasaland, and the Republic of South Africa. In respect to South Africa and Rhodesia whose policy of apartheid and discrimination is notorious, it is fairly certain that racial considerations are the prime factor in the imposition of the penalty of death for rape.

We submit that the evolving standards of civilized decency in the nations of the world no less than in the United States call for a declaration by this Court that the death penalty for non-homicidal rape constitutes constitutionally impermissible cruel and unusual punishment.

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62. *Supra*, p. 29.

63. UN Report, p. 40.

Conclusion

All the evidence points to the conclusion that capital punishment is on its way out. It is but a matter of time before the laws authorizing it are repealed or become dead letters. The reason for this is that it no longer comports with "the evolving standards of decency that mark the progress of a maturing society," and this will become increasingly obvious in the coming years.

Why, then, should not the Court abstain and let time resolve the issue? First, because when constitutional rights, particularly those that are fundamental, are violated, they should be vindicated promptly.

Thus, in 1966, it was quite clear that the poll tax in state elections was on its way out and had but few years of survival; yet that fact did not deter this Court from declaring it unconstitutional in the very few states which still retained it.[64] Occasionally, as in the case of racial segregation in the schools, the Court has felt that prompt vindication is impracticable and has contented itself with decreeing effectuation of its decision with all deliberate speed.[65] Looking backwards, it is by no means certain that a judgment ordering reasonably prompt compliance with the constitutional mandate would not have worked better.

But whatever the case may be with respect to school segregation, no practical considerations dictate delay in declaring constitutional rights under the Eighth Amendment. The Court's judgment will require no complex restructuring of communal institutions. As in the case of the poll tax, the judgment will be self-executing.

64. *Harper* v. *Virginia State Board of Elections,* 383 U.S. 663 (1966).

65. *Brown* v. *Board of Education,* 349 U.S. 294 (1955).

But, more important by far, until such time as the slow wheels of legislative reform catch up with the national conscience, human lives in an amount which cannot be foretold, will have been extinguished. We who submit this brief borrow from our Jewish tradition in noting that our Rabbis taught us that he who destroys one life, it is as though he destroyed the whole world; while he who sustains one life it as though he sustained the entire world.[66] This, we believe, applies even to the life of a rapist.

In *Trop* v. *Dulles*, 356 U.S. at 100, Mr. Chief Justice Warren stated that "the basic concept underlying the Eighth Amendment is nothing less than the dignity of man. While the State has the power to punish, the Amendment stands to assure that this power be exercised within the limits of civilized standards." These standards, we submit, require the Court to declare at this time that the death penalty for non-homicidal rape affronts the dignity of man, does not comport with civilized standards and cannot be sustained under the Eighth Amendment.

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66. *Talmud, Sanhedrin*, ch. 4, Mishnah 5.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 13

WILLIAM L. MAXWELL,

Petitioner,

—v.—

O. E. BISHOP, Superintendent of Arkansas State Penitentiary,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

~~MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF AND~~ SUPPLEMENTAL BRIEF FOR PETITIONER

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tatutes:

rk. Stat. Ann. §43-1921 (1964 Repl. vol.) 7
rk. Stat. Ann. §43-1922 (1964 Repl. vol.) 7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 13

WILLIAM L. MAXWELL,

Petitioner,

—v.—

O. E. BISHOP, Superintendent of Arkansas State Penitentiary,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Motion for Leave to File Supplemental Brief

Pursuant to Rule 41 (5), (6) of this Court, petitioner Maxwell respectfully asks special leave to file the appended Supplemental Brief.

Certiorari was granted in this case on December 16, 1968, limited to two questions:[1]

"2. Whether Arkansas' practice of permitting the trial jury absolute discretion, uncontrolled by stand-

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[1] These were questions 2 and 3 of the Petition for a Writ of Certiorari. By a separate motion filed contemporaneously with the present one, petitioner is requesting that the Court enlarge the scope of its grant of *certiorari* to include consideration also of Question 1 of the Petition, relating to petitioner's claim that Arkansas juries have discriminated on grounds of race in exercising their discretion to sentence men convicted of the crime of rape to death.

ards or directions of any kind, to impose the death penalty violates the Due Process Clause of the Fourteenth Amendment?

"3. Whether Arkansas' single-verdict procedure, which requires the jury to determine guilt and punishment simultaneously and a defendant to choose between presenting mitigating evidence on the punishment issue or maintaining his privilege against self-incrimination on the guilt issue, violates the Fifth and Fourteenth Amendments?"

The case was argued on March 3 and 4, 1969, by counsel for petitioner, for respondent, and for the State of California as *amicus curiae*. California urged orally (as it had previously in its brief *amicus curiae*) that the issues on which *certiorari* had been granted ought not to be decided. Rather it contended that the case should be disposed of (if the facts warranted) upon the ground that the jury which condemned petitioner to die had been selected in violation of the retroactive ruling in *Witherspoon* v. *Illinois*, 391 U.S. 510 (1968). The Court requested and received, without objection of the parties, a transcript of petitioner's trial that included the *voir dire* examination of prospective jurors.

At the argument on March 4, petitioner took the position that this Court should not refuse to decide the issues on which it had granted *certiorari*, and which remained squarely and properly presented by this case, simply because petitioner's death sentence might also be invalid under *Witherspoon*. Those issues remained vital to petitioner and to hundreds of other death-sentenced men across the Nation, he argued, even though petitioner's present sen-

tence to death by electrocution should be set aside by force of the *Witherspoon* rule.

On May 26, 1969, this Court ordered the case restored to the calendar for reargument on October 13, 1969.

Events since the first argument of this case in March of 1969 seem to us relevant to this Court's appreciation of the proper place of the *Witherspoon* issue in the present litigation. It is the purpose of petitioner's Supplemental Brief to discuss the implications of those events, which include this Court's decision of *Boulden* v. *Holman*, 394 U.S. 478, on April 2, 1969, and numerous opinions of state and lower federal courts rendered or reported since March of 1969, considering *Witherspoon* and the other issues presented by petitioner's Petition for Certiorari.

We have delayed the preparation of this Supplemental Brief until September in order to permit inclusion in it of references to as many relevant 1969 state and lower federal decisions as could be found. We seek to file it at this time so that respondent and the *amicus curiae* may have a month within which to reply prior to reargument. For these reasons, we now request leave of the Court to file the appended Supplemental Brief.

IN THE

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

SUPPLEMENTAL BRIEF FOR PETITIONER

Petitioner contends herein that his death sentence is constitutionally invalid under *Witherspoon* v. *Illinois*, 391 U. S. 510 (1968). (Part I, *infra*.) For this reason, the judgment below, which denies him the last available judicial relief against the execution of that sentence by electrocution, cannot properly be affirmed by this Court. (Part II, *infra*.) However, the invalidity of petitioner's sentence under *Witherspoon* does not require the Court—and should not persuade the Court—to decline to consider petitioner's other challenges to the Arkansas capital sentencing procedure which has authorized his imprisonment under an unconstitutional sentence of death for more than seven years and to which he will be subjected, again unconstitu-

tionally, on any retrial occasioned by a *Witherspoon* disposition here. Those other challenges are not rendered moot by *Witherspoon;* and their determination by this Court is, if possible, more important to the proper and constitutional administration of justice in capital cases today than it was when the Court first agreed to consider petitioner's claims on *certiorari* in December, 1968. (Part III, *infra.*)

I.

Petitioner's Death Sentence Is Invalid Under *Witherspoon.*

A. *Facts Relevant to the* Witherspoon *Issue*

Fifty-five veniremen were examined in the course of selecting the twelve jurors who sentenced petitioner to die.[2] Of the 43 veniremen excused from service on the jury, 12 were excused on peremptory challenge by the defense,[3] 7 were challenged peremptorily by the prosecution,[4] 17 were

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[2] Two panels of veniremen were called: the regular panel, having 31 veniremen, and a special panel of 33 (18 of whom had previously been qualified and 15 of whom had not). Of the 64 veniremen thus brought into the courtroom, 55 were interrogated and excused or passed on the *voir dire* before the process of selecting a jury was completed. Tr. 108-238; see particularly Tr. 108-109. [Tr. here and hereafter refers to the transcript of petitioner's trial in the Circuit Court of Garland County, Arkansas, March 19–April 5, 1962, which is included in and paginated as a part of the record on petitioner's direct appeal to the Arkansas Supreme Court, Criminal No. 5057, handed up to this Court on the first argument of the case here, March 4, 1969.]

[3] Veniremen Groom (Tr. 124), McClard (Tr. 153), Madden (Tr. 170), Johnson (Tr. 170), Maddox (Tr. 170), Thomas (Tr. 170), Bledsoe (Tr. 199), Rephan (Tr. 205), Raymond (Tr. 205), Lowrey (Tr. 209), Miller (Tr. 220), Gibbs (Tr. 230).

[4] Veniremen Graham (Tr. 136), Ross (Tr. 154), Cheatham (Tr. 186), Wesson (Tr. 195), King (Tr. 201), Thomas (Tr. 214), Quinn (Tr. 226).

d for cause by the court on grounds other than op-
on to capital punishment,[5] and 7 were excused for
by the court because of their opposition to capital
ment.[6] (The defense thus exhausted all twelve of the
ptory challenges allowed it under Arkansas proce-
Ark Stat. Ann. §43-1922 (1964 Repl. vol.); see Tr.
hile the prosecution failed to use only three of its
ble ten peremptories, Ark. Stat. Ann. §43-1921 (1964
vol.).[7])

iry on the *voir dire* concerning the veniremen's at-
s toward capital punishment was ordinarily made by
osecutor. The questions he asked varied somewhat
enireman to venireman. But, whenever any answer
ting any sort or degree of opposition to the death
y was received, the prosecutor made his challenge
use which was thereupon granted by the Court with-
rther inquiry.

relevant portions of the *voir dire* examination of
ven jurors excused for opposition to the death penalty
t out in Appendix A to this brief. We summarize
ere:

---

iremen Wafford (Tr. 111), Rather (Tr. 113), Calcote (Tr.
), Elliott (Tr. 114-115), Lowrey (Tr. 115), Rhiddlehoover
5-116), Reed (Tr. 131), Buchannan (Tr. 132), Rainwater
4), Rowell (Tr. 155), Weston (Tr. 162), Dean (Tr. 162),
(Tr. 164), Green (Tr. 179-180), Robertson (Tr. 205), Jackson
7), Douglas (Tr. 223).

iremen McCleary (Tr. 117), Wade (Tr. 159), Hagy (Tr.
troupe (Tr. 171), Breland (Tr. 178-179), Adams (Tr. 181),
ms (Tr. 195-196).

e prosecutor's use of peremptories followed the common
n: of the seven veniremen he excused (note 4, *supra*) six
Negro (invariably after only cursory questioning, except
pursuit of a possible ground of challenge for cause seemed
to save him use of a peremptory) and one was a white man
Tr. 154), whose half-brother appears to have had some sort
in with the prosecutor.

(1) *Venireman McCleary*: After the court had questioned the first box of twelve veniremen on subjects other than capital punishment and had excused several for cause, the prosecutor was invited to inquire. He asked the first remaining venireman, Mr. Kimball, "if the evidence convinced you beyond a reasonable doubt at the conclusion of this trial that the defendant was guilty, that you thought a death sentence was justified, do you have any conscientious scruples that prevent your imposing such a sentence?" Mr. Kimball said no. The prosecutor then asked Mrs. Kanada "if you were convinced beyond a reasonable doubt at the conclusion of this trial that the defendant was guilty, that you thought a death sentence was justified, would you have any conscientious scruples *about imposing* the death sentence [emphasis added]?" Mrs. Kanada said no. The prosecutor pursued:

> "Q. Mr. Groom, you have heard the question I just asked, do you entertain any such conscientious scruples *against* the death sentence [emphasis added]?"
>
> "A. No.
>
> "Q. Mr. Martin, do you entertain any such scruples?
>
> "A. No.
>
> "Q. Mr. Beavers?
>
> "A. No, not at this point?
>
> "Q. Do you entertain *any* conscientious scruples *about imposing* the death penlaty [*sic*] [*emphasis added*]?"
>
> "A. No.
>
> "Q. Mr. Rima?
>
> "A. No.
>
> "Q. Mr. McCleary?
>
> "A. Yes, I am afraid I do.
>
> "Q. I submit, your Honor, that Mr. McCleary should be excused.

"THE COURT: Alright, [*sic*] Mr. McCleary.

"LET THE RECORD SHOW 1 EXCUSED, AGAINST DEATH SENTENCE." (Tr. 116-117.)

(2) *Venireman Wade*: The prosecutor inquired:

"Q. Mrs. Wade, if you were convinced beyond a reasonable doubt of the guilt of the defendant and you felt the crime he committed was proved beyond a reasonable doubt and was so abhorrent as to justify the death penalty would you have any conscientious scruples against the death penalty?

"A. I would not sentence the death penalty.

"MR. WHITTINGTON: I submit, your Honor, that Mrs. Wade should be excused.

"LET THE RECORD SHOW MRS. WADE EXCUSED, DOES NOT BELIEVE IN THE DEATH PENALTY." (Tr. 159.)

(3) *Venireman Hagy*: The prosecutor asked:

"Q. Mrs. Hagy, if you were convinced beyond a reasonable doubt of the guilt of the defendant and you thought that this crime was so abhorrent as to justify the death penalty would you entertain any conscientious scruples about inflicting the death sentence?"

"A. I don't believe in capitol [*sic*] punishment.

"Q. You do not believe you could return a verdict of capitol [*sic*] punishment?

"A. No sir, I don't believe in capitol [*sic*] punishment.

"THE COURT: You will be excused.

"LET THE RECORD SHOW MRS. HAGEY [*sic*] EXCUSED, DOES NOT BELIEVE IN CAPITOL [*sic*] PUNISHMENT." (Tr. 160.)

(4) *Venireman Stroupe*: The prosecutor asked:

"Q. If you were convinced beyond a reasonable doubt at the end of this trial that the defendant was guilty and that his actions had been so shocking that they would merit the death penalty do you have any conscientious scruples about capitol [*sic*] punishment that *might* prevent you from returning such a verdict [*emphasis added*]?

"A. *I think* I do [*emphasis added*].

"MR. WHITTINGTON: I submit, your Honor, that the juror should be excused.

"THE COURT: You may be excused.

"LET THE RECORD SHOW MRS. STROUPE EXCUSED, AGAINST THE DEATH PENALTY." (Tr. 171.)

(5) *Venireman Breland*: The prosecutor asked:

"Q. Mrs. Breland, if you were convinced that the defendant was guilty beyond a reasonable doubt at the end of this trial and that his actions had been so shocking and abhorent [*sic*] as to warrant the death penalty *do you have any feelings* about capitol [*sic*] punishment *to prevent* your returning such a verdict [*emphasis added*]?

"A. Yes, *I think* I do [*emphasis added*].

"MR. WHITTINGTON: I submit, your Honor, that Mrs. Breland be excused.

"THE COURT: You may be excused.

"LET THE RECORD SHOW MRS. BRELAND EXCUSED, DOES NOT BELIEVE IN CAPITOL [*sic*] PUNISHMENT." (Tr. 178-179.)

enireman Adams: The prosecutor asked:

Q. Mr. Adams, do [*you*] have any feeling concern-
capitol [*sic*] punishment that would prevent you
nake you have any feelings about returning a death
ence if you felt beyond a reasonable doubt that the
endant was guilty and that his crime was so bad as
nerit the death sentence [*emphasis added*]?
A. No, I don't believe in capitol [*sic*] punishment.

"THE COURT: You will be excused Mr. Adams.
"LET THE RECORD SHOW MR. ADAMS
XCUSED, DOES NOT BELIEVE IN CAPITOL
sic] PUNISHMENT." (Tr. 181.)

enireman McAdams: The prosecutor asked:

Q. Mr. McAdams, do you have any conscientious
uples against capitol [*sic*] punishment?
A. I don't have scruples, I have convictions.
Q. What are they? A. I am against capitol [*sic*]
ishment.

"THE COURT: You will be excused, Mr. Mc-
dams.
"LET THE RECORD SHOW MR. McADAMS
XCUSED, AGAINST CAPITOL [*sic*] PUNISH-
IENT." (Tr. 195-196.)

instructive to compare the summary dismissal of
ven prospective jurors with the interrogation of
nan Rephan, set out in Appendix B, *infra*. Mr.
indicated some uncertainty when asked whether he
nfer guilt from the defendant's failure to take the
Thereafter he was informed once by the prosecutor
ee times by the court that the court would instruct
y that it could not hold against the defendant his

failure to take the stand; and the court pressed the specific inquiry: "would you substitute your feelings and your opinion for the instruction of the Court or would you be guided by the Instructions of the Court?" (Tr. 168.) "In other words, you would not substitute your opinion or feelings against what the Court told you the law was?" (Tr. 169.) Upon Venireman Rephan's representation that he "would abide by the law" (*ibid.*), he was qualified as a juror.[8] Yet not one of the veniremen who expressed uncertainty on the subject of the death penalty was instructed that Arkansas law required him to consider the imposition of that penalty upon one found guilty of the crime of rape; not one was asked—with or without the benefit of such an instruction—whether he could "subordinate his personal views to what he perceived to be his duty to abide by his oath and to obey the law of the State." *Witherspoon* v. *Illinois*, 391 U.S. 510, 514-515 n. 7 (1968).

B. *Application of the* Witherspoon *Rule to This Record*

We think the conclusion inescapable that the process of selecting the jury which condemned petitioner to die violated the rule announced in *Witherspoon*.

The holding in the *Witherspoon* case—which this Court expressly declared to be "fully retroactive" (391 U.S., at 523, n. 22)—invalidates all but a narrow form of death-qualification procedure,[9] carefully and meticulously described in the Court's opinion.[10] That holding invalidates

[8] The defense later struck him peremptorily (Tr. 205).

[9] The question of the constitutionality of that narrow form of death-qualification was expressly reserved in *Witherspoon*, a point which the lower courts have altogether ignored. See note 25 *infra*.

[10] We are not unaware that the lower courts have generally refused to give this effect to *Witherspoon*, a matter with which we deal in Appendix C, *infra*. We, however, here take the *Witherspoon*

the systematic exclusion of prospective jurors scrupled against the death penalty "on any broader basis" (391 U.S., at 522, n. 21) than one which excuses "only veniremen who . . . [make] unmistakably clear (1) that they would *automatically* vote against imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's *guilt.*" (391 U.S., at 522 n. 21, emphasis in original.) Thus, to escape the explicit prohibition of *Witherspoon,* a practice of excuses for cause on account of scruples against the death penalty must allow a juror to serve unless he "states unambiguously" (391 U.S., at 515-516, n. 9) on his *voir dire* that his attitudes fall within one or the other of two criteria: (1) that his opposition to the death penalty is such that he cannot sit as a fair and impartial trier of the issue of the defendant's *guilt or innocence* (391 U.S., at 522, n. 21), and, in this aspect, he cannot "subordinate his personal views to what he . . . [perceives] to be his duty to abide by his oath as a juror and to obey the law of the State" (391 U.S., at 514-515, n. 7; see also 391 U.S., at 515-516, n. 9); or (2) that he is irrevocably committed against and would not consider voting for the death penalty in any case, regardless of the facts and circumstances that might appear at the trial (391 U.S., at 522, n. 21), and again, in this aspect, he cannot "subordinate his personal views to what he . . . [perceives] to be his duty to abide by his oath as a juror and to obey the law of the State" (391 U.S., at 514-515, n. 7). These constitutional rules were reaffirmed in similarly precise language in *Boulden* v. *Holman,* 394 U.S. 478, 482 (1969):

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opinion to mean exactly what it says—an approach that seems fully justified by the obvious care with which that opinion was written.

> ". . . 'The most that can be demanded of a veniremen in this regard,' we said [in *Witherspoon*], 'is that he be willing to *consider* all of the penalties provided by state law, and that he not be irrevocably committed, before the trial has begun, to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceedings. If the *voir dire* testimony in a given case indicates that veniremen were excluded on any broader basis than this, the death sentence cannot be carried out. . . .' . . . We made it clear that '[u]nless a veniremen states unambiguously that he would automatically vote against the imposition of capital punishment no matter what the trial might reveal, it simply cannot be assumed that that is his position.' . . . ."

At petitioner Maxwell's trial, no inquiry was made of any juror excluded because of his views toward capital punishment as to whether those views would affect in any manner or degree his ability to find the defendant *guilty*. Under Arkansas procedure, as under the Illinois procedure considered in *Witherspoon*, a guilty verdict would not inevitably entail the death penalty, and for this reason (if for no other) "it simply cannot be assumed" that a juror conscientiously opposed to the death penalty would thereby be unfitted to deliberate fairly on the question of guilt or innocence. Concern for qualifying the jury to decide the guilt issue—one of the two grounds reserved in *Witherspoon* as a possible[11] exception to the strictures of that decision—therefore must be put wholly out of account as a potential justification for what Arkansas has done here.[12]

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[11] See note 9 *supra*.

[12] For this reason, we do not explore herein the questions of the validity of this justification or of its limitations if valid.

As for the second *Witherspoon* reservation—exclusion of prospective jurors who "state unambiguously" and thus make "unmistakably clear" that they could never vote for the death penalty in any case and would decline to follow the law of the State obliging them to consider such a penalty—we think it evident that no venireman excused in petitioner's case expressed anything approaching such a categorical attitude:

(1) Venireman McCleary was interrogated at the conclusion of the questioning of a series of prospective jurors relative to scruples against the death penalty. The first juror in the series was asked whether, if he found the defendant guilty beyond a reasonable doubt and thought a death sentence justified, he had "any conscientious scruples that prevent your imposing such a sentence?" (Tr. 116.) We think that an affirmative answer to this question could not validly support exclusion under *Witherspoon,* for several reasons. First, although the scruples inquired about are described as those that "prevent" a death verdict, it is not made clear to the juror whether "prevent" means absolutely to preclude, or rather merely to hinder, to hamper, to impede or to make difficult the return of a death verdict.[13] Second, the question is very far from asking whether the juror is committed against a death verdict in *any and every case,* regardless of the evidence or circumstances. Third, no effort is made by the prosecutor or the court to explain to the juror that his duty as a juror under the law of Arkansas is to consider imposing the death penalty upon con-

[13] Cf. *People* v. *Williams,* 71 A.C. 638, 654-656, —— Cal. 2d ——, —— P. 2d —— (1969).

viction for the crime of rape, and then to inquire whether he could "subordinate his personal views [on capital punishment] to . . . [this] duty," 391 U.S., at 514-515, n. 7. Compare the inquiry pressed in the case of Venireman Rephan, who indicated that he might hold against the defendant his failure to take the stand, pp. 11-12 *supra;* Appendix B, *infra.*

But, in any event, this was not the question ultimately asked of Venireman McCleary. Subsequent phrasings of the inquiry put to jurors following the first and preceding McCleary watered down the definition of scruples from those "that prevent your imposing . . . [a death] sentence" to "scruples *about imposing* the death sentence" [emphasis added], to "*such* conscientious scruples *against* the death sentence" (referring to the previous questions) [emphasis added]. When a venireman gave less than an unequivocal "no" to this form of the question, he was asked: "Do you entertain *any* conscientious scruples *about imposing* the death penalty [*sic*]" [emphasis added]. It was following this formulation—which plainly asks no more than whether the venireman has "general objections to the death penalty or . . . conscientious or religious scruples against its infliction" (*Witherspoon*, 391 U.S. at 522, as quoted in *Boulden* v. *Holman*, 394 U.S., at 481)—that the prosecutor called out the names of several successive veniremen including McCleary. McCleary responded "Yes, I am afraid that I do," and was forthwith excused for cause. (Tr. 116-117.)

(2) Venireman Wade was asked whether, if convinced of guilt beyond a reasonable doubt and that the crime was so abhorrent as to justify a death verdict

she "would . . . have any conscientious scruples against the death penalty?" She replied: "I would not sentence the death penalty," and was immediately excused. (Tr. 159.) Wade is the only one of the seven veniremen excused for scruples whose exclusion could arguably come within shooting distance of the *Witherspoon* reservation. But we submit that her expression cannot support her exclusion as a juror who made "unmistakably clear" she would not consider a death verdict.

First, like the question put to the first juror in the *McCleary* series, *supra*, the question asked of Wade—and, necessarily, her response—did not address the issue whether she could *under no circumstances in any case* vote for death. This is particularly significant because Wade replied not that she *could* not impose the death sentence, but that she *would* not. *Witherspoon* made quite explicit that a juror cannot be expected to swear that he *would* impose a death sentence. 391 U.S., at 522 n. 21. Moreover, no more than any other venireman was Wade instructed that the law of Arkansas obliged her, as a juror, to consider imposition of the death penalty. She was not asked whether she was able to subordinate her personal feelings to this State-imposed duty. (See discussion at p. 13 *supra*.) She was merely excused for cause because she expressed her feelings—uninstructed and of uncertain strength—that she would not vote for the defendant's death.

A further consideration, too, condemns her exclusion. Because this case was tried long prior to *Witherspoon*, it cannot be assumed that the trial judge inter-

preted Wade's response within the framework of the constitutional standards announced by that decision, or that he found her to be disqualified consonantly with those standards. To the contrary, the court's summary dismissal of every juror who expressed the slightest reservations concerning the death penalty—most of whom were palpably *not* disqualified by *Witherspoon* standards—demonstrates that his ruling on the prosecutor's challenge to Wade was made pursuant to constitutionally impermissible standards. For this reason alone, Wade's exclusion was improper; this Court cannot now, obviously, sustain the trial judge's determination of an issue that he never determined. Cf. *Rogers* v. *Richmond*, 365 U.S. 534 (1961). Petitioner was entitled to be tried by a jury from which veniremen were not excluded "on any broader basis" (*Witherspoon*, 391 U.S., at 522 n. 21; *Boulden* v. *Holman*, 394 U.S., at 482) than *Witherspoon* countenanced. Mrs. Wade, like her compeers, was excluded on a demonstrably broader basis.

(3) Venireman Hagy was asked whether, if convinced of guilt beyond a reasonable doubt and that the crime was so abhorrent as to justify a death verdict, she "would entertain any conscientious scruples about inflicting the death sentence?" She replied "I don't believe in capitol [*sic*] punishment," and was then asked: "You do not believe you could return a verdict of capitol [*sic*] punishment?" She said: "No sir, I don't believe in capitol [*sic*] punishment." (Tr. 160.)

Apart from the several considerations that we have advanced in connection with the exclusion of Venire-

mán Wade, *supra*, Mrs. Hagy was unconstitutionally excluded. There is not the slightest indication in her responses of the nature or strength of her view twice stated as "I don't believe in capitol [*sic*] punishment," or of the implications of that view for her performance as a juror. The prosecutor's second question to her simply assumed the equation of belief against capital punishment with a belief that the juror could not return a capital verdict. If her reply "No sir," to this question—coupled with an exact repetition that she didn't "believe in" the death penalty—meant anything "unmistakably," it meant only that she accepted this equation by the prosecutor, which was not condemned by the court, as under *Witherspoon* it obviously must be. *See* 391 U.S., at 516 n. 9; *Boulden* v. *Holman*, 394 U.S., at 482; *id.*, at 483-484: "[I]t is entirely possible that a person who has 'a fixed opinion against' or who does not 'believe in' capital punishment might nevertheless be perfectly able as a juror to abide by existing law—to follow conscientiously the instructions of a trial judge and to consider fairly the imposition of the death sentence in a particular case."

(4) Venireman Stroupe was excluded for saying that she *thought* she had conscientious scruples about capital punishment that *might* prevent her from returning a death verdict. (Tr. 171.) The inconsistency of this exclusion with *Witherspoon* requires no discussion.

(5) Mrs. Breland was excluded because she *thought* she had *feelings "to prevent"* her returning a death verdict. (Tr. 178-179.) We have discussed at p. 15 *supra* the impermissible ambiguity inherent in a question referring to scruples "that prevent" a death ver-

dict. The still weaker formulation in the question asked Breland, "any feelings . . . to prevent" returning a death verdict, is evident. Even a categorical answer to that form of question would not support exclusion under *Witherspoon*. But Mrs. Breland replied only that she thought she had such feelings. No further inquiry was directed to determining what she would think if the meaning of the question asked her were clarified and corrected, and her duty as a juror explained.

(6) Mr. Adams was asked whether he had any feeling concerning capital punishment that would prevent him *or would make him have any feelings about returning a death sentence*. He replied: "No, I don't believe in capitol [*sic*] punishment." (Tr. 181.) He thus established unmistakably that (a) he did not believe in the death penalty; and (b) this feeling would make him have some feelings about returning a death sentence. His exclusion is a plain violation of *Witherspoon*.

(7) So was the exclusion of Venireman McAdams, who said only that he had convictions, namely: "I am against capitol [*sic*] punishment." (Tr. 195-196.)

Thus we conclude that, in selecting the jury which condemned petitioner Maxwell to die, the State of Arkansas failed to conform to the requirements of *Witherspoon*; and accordingly his "death sentence cannot be carried out . . . ." *Witherspoon*, 391 U.S., at 522 n. 21, quoted in *Boulden* v. *Holman*, 394 U.S., at 482.

In reaching this conclusion, we have not ignored the numerous opinions of lower courts rendered since *Wither-*

spoon which purport drastically to curtail the operation of that decision. In Appendix C to this brief, *infra*, we shall have occasion to catalogue those opinions and to describe the full extent of their obstruction of this Court's considered and carefully articulated holding. Suffice it to say here that most of the rules developed in the wake of *Witherspoon* to avoid its force have no possible application on the present record—for example, the rule denying relief to a death-sentenced man if the number of veniremen excused in violation of *Witherspoon* is less than the number of peremptory challenges remaining unused by the prosecution at the conclusion of selection of the jury (see p. 16a *infra*); or the rule permitting a trial judge who is supposed to have conducted his *voir dire* examination *generally* in conformance with the requirements of *Witherspoon* irreversibly to exclude particular veniremen in violation of those requirements, upon the reasoning that appellate courts will not displace trial judges in the interpretation of particular jurors' responses on *voir dire* (see pp. 14a-15a *infra*).

We conceive only three among the post-*Witherspoon* doctrines of the lower courts that could be interposed to deny petitioner Maxwell relief from his unconstitutional sentence of death; and each of the three is insubstantial:

(A) The "different atmosphere" doctrine of *People v. Speck*, 41 Ill. 2d 177, 242 N.E. 2d 208 (1968), and cognate cases (p. 12a *infra*), would limit the *Witherspoon* holding to its most adventitious circumstances. Specifically, these cases attribute the decision in *Witherspoon* to the manner in which the *voir dire* examination in that particular case was conducted, namely, by hurriedly and deprecatorily dismissing all

"conscientious objectors" at the outset. Cases in which the same wholesale exclusion is worked with less dispatch and more decorum are said to present a "different atmosphere" and hence to be distinguishable. We need not pause to examine the intrinsic merit of this distinction, whose least effect would be to reduce nine-tenths of the carefully written *Witherspoon* opinion to purposeless and inexplicable maundering. For the distinction, if ever available, cannot survive *Boulden* v. *Holman.*

(B) A related doctrine would hold that a death sentence need not be vacated where only a few veniremen have been improperly excluded by *Witherspoon* criteria, since some few exclusions without more do not really distort the representative character of the jury which it was *Witherspoon's* purpose to assure. This reasoning has been adopted by some courts and rejected by others. (See pp. 15a-16a *infra.*) It is, we think, indefensibly wrong.

Trial juries consist of only twelve jurors, and can never be truly "representative" of a community in any other sense than that the procedure used to select the men and women who will sit in the box does not exclude or discriminatorily limit the possibility of participation of any identifiable population group. Any procedure, practice or policy which systematically excludes an identifiable group makes the juries selected under it unrepresentative,[14] whether one, or seven,[15] or

[14] Of course, some systematic exclusions—such as occupational exemptions in proper cases—may not result in constitutionally impermissible unrepresentativeness. But *Witherspoon* holds that the exclusion of jurors opposed to capital punishment does affect that result.

[15] As here.

thirteen[16] or a hundred veniremen of the systematically excluded class actually appear on the panel and are thrown out by operation of the procedure. In petitioner's case, seven veniremen having attitudes toward the death penalty which brought them under the rule of *Witherspoon* appeared and might have served. Every one was excluded, on that constitutionally impermissible ground, as a matter of state practice directed specifically to excluding them. The luck of the draw might have produced more or fewer; no matter; Arkansas' death-qualification practice as it was employed at petitioner's trial excluded them all. It is this practice which *Witherspoon* holds invalid, for the obvious and irrefutable reason that its design and necessary effect is to deny a capital defendant's right to have on his trial jury whatever number of members may be put there by chance from out of any population group which the State cannot legitimately exclude.

We submit it is ridiculous to suppose that this Court would countenance for one moment the exclusion by a trial judge, for cause, of a single Negro juror on the stated ground that he is a Negro, although by chance he was the only Negro actually to appear on the venire and suffer exclusion on that general ground. Negro defendants[17] are entitled to have their juries selected by a process that does not exclude *any* Negro jurors on account of race; and, for the same reason, capital defendants are entitled under *Witherspoon* to have their juries selected by a process that does not

[16] As in *Boulden* v. *Holman*.

[17] And perhaps white defendants—a point which it would be diverting to discuss herein.

exclude *any* jurors on account of general objections to the death penalty. Because of the practical realities of the random system by which venires are drawn—only generally and as a procedural matter approximating representativeness—and also because of the practical realities of the manner in which jurors function—every one affecting in an uncertain measure the deliberations of all—there is no room under the Constitution for a *de minimis* doctrine relative to forbidden systematic exclusion. Thus we need not labor the obvious point that seven exclusions in selection of a jury of twelve could not, by any conceivable logic, be *de minimis*.

(C) Some courts have taken the view, apparently always as an alternative ground of decisions sustaining the exclusion of jurors forbidden by *Witherspoon*, that the defendant did not object to the exclusion, or did not pursue exhaustive examination of the jurors excluded, or did not exhaust his peremptory challenges and by that means express his dissatisfaction with the jury. (See pp. 16a-17a *infra*.) Petitioner's trial counsel did exhaust his peremptories; but he did not object to the excuse for cause of scrupled jurors, nor did he add his own inquiries to the constitutionally inadequate ones of the prosecutor that preceded each such excuse. Neither did Witherspoon's trial counsel, nor Boulden's; so those decisions are amply dispositive of this point. Certainly petitioner was not required to anticipate this Court's decision in *Witherspoon* and make an objection which under the law of Arkansas, as it stood at the time of his trial, could not conceivably have been sustained. *O'Connor* v. *Ohio*, 385 U.S. 92 (1966).

II.

This Court Cannot Properly Affirm the Decision elow, Which Would Send Petitioner to His Death Pur- uant to the Verdict of an Unconstitutionally Selected ury.

There remains to be considered the question whether his Court can take notice of the plain unconstitutionality f petitioner's death sentence under *Witherspoon,* in view f the circumstance that no *Witherspoon* contention was rged in his petition for habeas corpus, or in his appeal elow, or in his petition for *certiorari* here. The answer o that question is controlled by *Boulden* v. *Holman.* Boulden came to this Court in a procedural posture iden- cal to petitioner's; the Court held that the proper dispo- ition of his case, in view of the *Witherspoon* violation pparent at his trial, was a remand to the district court where the issue that has belatedly been brought to our ttention may be properly and fully considered." 394 U.S., t 485.

Such a disposition would be all the more appropriate efe—were there no other grounds upon which the judg- ent of the court of appeals below should be reversed See Part III, *infra*)—in light of the history of proceed- ngs in the present matter. Petitioner Maxwell has been n the lip of death before, and should not cruelly be placed ere again, at least after the unconstitutionality of his eath sentence has become apparent. In the instant fed- ral habeas corpus proceeding—petitioner's second—insti- uted on July 21, 1966 (App. 2), the federal district court eclined to stay petitioner's execution then set for Sep- ember 2, 1966 (App. 2, 12), instead undertaking to hear

and decide the issues raised by his petition prior to the execution date. (See App. 17.) The court denied the petition on August 26, and simultaneously declined to issue a certificate of probable cause or a stay of execution pending appeal. (App. 41.) A Circuit Judge of the Eighth Circuit having denied applications for a certificate and a stay, it remained for Mr. Justice White to save petitioner's life by issuing a stay on September 1, 1966, one day before his scheduled execution.

In denying stays, the judges below were doubtless affected by the consideration that this was not petitioner's first resort to the federal courts. Circuit Judge Matthes, indeed, rested his refusal to stay the execution expressly on the ground that Maxwell's was a repeater petition. If petitioner were now to be remitted to a third federal habeas corpus proceeding, necessary stays might be at least as difficult to obtain as they were in the second. In its pretrial conference order in the present stage of the proceedings, the district court wrote:

> "Counsel for Maxwell are now cautioned that if they know of any other constitutional grounds on which his conviction and sentence may be subject to attack, they should advance those grounds in this proceeding since this Court would be most reluctant to consider in some subsequent proceeding any ground of attack which could have been raised in this proceeding." (App. 17.)

We could not and we certainly do not quarrel with this admonition of the district court, which was manifestly fair and proper. But *Witherspoon* has supervened; the application of the admonition to the grounds given peti-

tioner by *Witherspoon* is unclear; for this reason, a remand such as was ordered in *Boulden* seems particularly fitting. Remand would be fitting, that is, if—as we have said—there were no other grounds upon which the judgment below should be reversed.

III.

The Court Should Not, by Reason of *Witherspoon's* Supervention, Refuse to Decide the Issues Upon Which It Has Granted *Certiorari* Here.

Contrary to California's submission as *amicus curiae*, we believe that the conclusions reached in Parts I and II *supra*—that petitioner's death sentence is unconstitutional under *Witherspoon*, necessitating at the least a remand to the district court—do not require and should not properly lead this Court to refuse to decide the issues upon which *certiorari* was sought and granted herein. We state our reasons for this view:

First, the invalidity of petitioner's death sentence by force of *Witherspoon* does not render his other constitutional contentions moot in a technical sense. We do not consider what would be the case if petitioner were now before the Court on direct review of the judgment of the Arkansas courts imposing upon him the death sentence which he challenges on several distinct grounds. It might well be, in such a situation, that decision of one ground would moot the others. But that is not petitioner's posture.

This is a federal habeas corpus proceeding of the sort in which—as the Court recently recognized in *Peyton* v. *Rowe*, 391 U.S. 54 (1968), and *Carafas* v. *LaVallee*, 391

U.S. 234 (1968)—relief other than outright release from confinement is both authorized and appropriate. If petitioner prevails on his federal constitutional claims, he will not thereby be entitled to an order requiring Arkansas to discharge him unconditionally, but rather to a conditional order of the kind now common in federal habeas corpus proceedings, commanding petitioner's release *unless* Arkansas retries or resentences him in a manner consistent with his constitutional rights as the federal court adjudicates them. If petitioner prevails on the *Witherspoon* ground alone, the appropriate federal order would require only his retrial by a jury selected conformably with *Witherspoon*; whereas if he prevails on his claims that other aspects of Arkansas' capital trial procedure are unconstitutional, the appropriate order would require relief from those unconstitutional procedures on any retrial. This difference in the outcome of the litigation depending upon the ground of decision makes plain that disposition of petitioner's case on *Witherspoon* grounds would not render his other claims technically moot. Cf. *Boulden v. Holman*, *supra*.

We are not, therefore, in an area where Article III restrictions upon the federal judicial power forbid this Court to decide the issues upon which it granted certiorari in December 1968. As to those issues, there remains a justiciable case and controversy between William I. Maxwell and the State of Arkansas. The question whether to decide the issues is plainly one within the scope of this Court's wise discretion—a discretion properly to be exercised in the light of the consequences of decision or non-decision both for the present parties and for others whose federal constitutional rights it is the purpose of the Court's certiorari jurisdiction to declare.

Second, then, we invite the Court's consideration of the following points, which we respectfully suggest should persuade it to exercise its undoubted discretion to adjudicate petitioner's constitutional challenges to Arkansas' procedure of allowing its juries arbitrary and lawless power to sentence to life or death in a single verdict capital trial:

(1) Petitioner Maxwell, following his trial under the challenged procedures, has now been on death row for more than seven years. If his case is disposed of on *Witherspoon* grounds alone, he will be subjected to a retrial for his life under the same procedures. It would surely be a work of the most exquisite cruelty to put him through another such trial if, as he claims, the procedures are unconstitutional. Nor does the State of Arkansas have any legitimate interest in conducting such a trial. If—as we are assuming—Arkansas' capital trial procedures are federally invalid, Maxwell will either survive long enough to upset the consequences of such a trial or he will be executed before he can. The first upshot gains Arkansas nothing; the second, nothing to which it is entitled.

(2) There are, to our knowledge, more than two dozen capital cases pending in this Court on petitions for *certiorari* raising one or both of the two constitutional issues upon which review was granted in the present case.[1] Post-conviction proceedings on behalf

[1] *Maggio v. New Jersey*, 69 T. 1969, No. 12 Misc.; *McGautha v. [illegible]*, 69 T. 1969, No. 16 Misc.; *Pinzella and Pinzella v. [illegible]*, 69 T. 1969, No. 18 Misc.; *Childs v. North Carolina*, 1969, No. 25 Misc.; *Sims v. Pigman*, 69 T. 1969, No. 38 Misc.; *[illegible] et al. v. California*, 69 T. 1969, No. 69 Misc.; *Negron [illegible]*, 69 T. 1969, No. 76 Misc.; *Jacobs v. Pigman*, 69 T. 1969, No. 112 Misc.; *Mayford v. Hocker*, 69 T. 1969, No. 229 Misc.

of more than a hundred other condemned men, raising the same issues, are pending in the lower courts.[1] For many of the condemned men, these issues are the only legal contentions now available in bar of their electrocutions and gassings.

[1] If the Court should decide the present case without resolving these issues, it might, of course, grant review in one or more of the other pending cases. But none of those cases presents the issues any more squarely or concretely than does petitioner's case; in none are the parties more sharply adverse; and petitioner's case has the distinct advantages (1) that the issues of state law and practice whose understanding is necessary to a proper formulation of the federal constitutional questions involved have been thoroughly

Smith v. *Nelson*, 0 T. 1969, No. 242 Misc.; *Reeves* v. *California*, 0 T. 1969, No. 243 Misc.; *Massey* v. *California*, 0 T. 1969, No. 329 Misc.; *Branum* v. *California*, 0 T. 1969, No. 332 Misc.; *Adams* v. *California*, 0 T. 1969, No. 341 Misc.; *Robinson* v. *California*, 0 T. 1969, No. 481 Misc.; *Arechiga* v. *Eyman*, 0 T. 1969, No. 287 Misc.; *Hill* v. *Patterson*, 0 T. 1969, No. 17 Misc.; *Smith and Higgins* v. *Washington*, 0 T. 1969, No. 113 Misc.; *Parmelee* v. *Georgia*, 0 T. 1969, No. 643 Misc.; *Hurst* v. *Illinois*, 0 T. 1969, No. 652; *Talbert* v. *California*, 0 T. 1969, No. 306 Misc.; *Wright and Aiken* v. *Washington*, 0 T. 1969, No. 281 Misc.; *Hall* v. *California*, 0 T. 1969, No. 503 Misc.; *Jaggers* v. *Kentucky*, 0 T. 1969, No. 122 Misc.; *Quintana* v. *Texas*, 0 T. 1969, No. 210 Misc.

[1] E.g., *Elderly* v. *Wainwright*, M.D. Fla., No. 67-98-Civ-J, a class-action habeas corpus proceeding raising these issues on behalf of the more than 60 inmates of Florida's death row; *Hall et al.* v. *Nelson*, N.D. Cal., No. 43438, described in Petition for Writ of Certiorari in *Anderson et al.* v. *California*, 0 T. 1969, No. 641 Misc., p. 8, n. 4.

Except, of course, the contention which this Court did not reach last term in *Boykin* v. *Alabama*, 395 U.S. 238 (1969), that the death penalty is a "cruel and unusual punishment" prohibited by the Eighth and Fourteenth Amendments.

treated in the opinions below; (2) that this case has already been fully briefed and argued, and set to be reargued; and (3) that the Court has been favored by briefing and argument herein on behalf of the State of California as well as the State of Arkansas, in defense of their common practices. The time required to bring another case thus to the point of decision would only delay resolution of the question of the constitutionality of the commonly used capital trial practices which petitioner challenges, during which period of delay further constitutionally assailable capital trials would have been had.

(4) On the other hand, if the present case is disposed of solely on the *Witherspoon* ground, the Court might decide to decline review in the other pending cases raising the questions on which *certiorari* was granted here. With all deference, such a decision could only be characterized as incredibly heedless of human life. For, still more than when the Court agreed to hear these questions in December of 1968, large numbers of lives depend immediately and totally upon their prompt and proper resolution by the Supreme Court of the United States. This is so because, within the past year, the highest courts of several of the States having the largest death row populations in the Nation have rejected the precise federal constitutional contentions [illegible] two federal courts of appeals

[illegible] *McGautha v. State*, Ala. [illegible], 211 So. 2d 873 (1968), and *Maxwell v. State*, Ala. [illegible], 210 So. 2d 280 (1968), reject both standards and split-verdict contentions); *In re Anderson*, 69 Cal. 2d 613, 73 Cal. Rptr. 21, 446 P. 2d 117 (1968) (re standards contention; California has split verdict procedure by statute); *Wainwright v. State*, 225 So. 2d 321 (Fla. 1969) (re standards contention; the Florida Supreme Court re-

having territorial jurisdiction over some of those States (in addition to the court below) have also rejected the contentions.[11] In these States and others, counsel for condemned men have been able to secure stays of execution, during recent months, only because of the pendency of this *Maxwell* case.[12] If *Maxwell* leaves unresolved the basic issues which it raises—and unless *certiorari* is, at the same time, granted on those issues in some other case—it is an unescapable prediction that dozens of human beings will die before this Court has another chance to pass upon the validity of their federal constitutional objections to their sentences of death.

(5) The matter might take on a different aspect if, by disposing of the present case on *Witherspoon*

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jected the "split verdict" contention in *Craig* v. *State*, 179 So. 2d 202 (Fla. 1965); *Miller* v. *State*, 224 Ga. 627, 163 S.E. 2d 73 (1968) (rejects both "standards" and "split-verdict" contentions); *Duncan* v. *State*, 441 S.W. 2d 688 (Mo. 1969) (rejects standards contention); *Howard* v. *State*, ——— Nev. ———, 455 P. 2d 34 (1969) (rejects "standards" contention); *State* v. *Forcella*, 52 N.J. 263, 245 A. 2d 181 (1968) (rejects both "standards" and "split-verdict" contentions); *State* v. *Crampton*, 18 Ohio St. 2d 187, 248 N.E. 2d 614 (1969) (rejects "standards" contention); *Hunter* v. *State*, ——— Tenn. ———, 440 S.W. 2d 1 (1969) (rejects "standards" contention); *Smith* v. *State*, 437 S.W. 2d 835 (Tex. Cr. App. 1969) and *Quintana* v. *State*, 441 S.W. 2d 191 (Tex. Cr. App. 1969) (reject "standards" contention; Texas now has statutory split-verdict procedure); *State* v. *Smith*, ——— Wash. 2d ———, 446 P. 2d 571 (1968) (rejects both "standards" and "split-verdict" contentions).

[11] *Sims* v. *Eyman*, 405 F. 2d 439 (9th Cir. 1969) (rejects both "standards" and "split-verdict" contentions); *Segura* v. *Patterson*, 388 F. 2d 849 (10th Cir. 1968) and *Bell* v. *Patterson*, 403 F. 2d 394 (10th Cir. 1968) (reject both "standards" and "split-verdict" contentions).

[12] See the Brief Amicus Curiae on Behalf of Robert Page Anderson, Frederick Satterfield, Walter C. Hines, Dorman Lee Talbot and Gerald Albert Beiryenan, filed herein.

grounds, the Court could expect to lay to rest any substantial number of these death cases. But the *Witherspoon* decision has been so badly crippled and contorted by ungenerous lower court constructions, which have invoked so many differing devices to defeat its effective implementation, that the restoration of *Witherspoon* to constitutional vigor could not conceivably be worked by any holding possible on the present record. We describe in Appendix C, *infra*, how *Witherspoon* has fared in the lower courts. As we have pointed out in Part I, *supra*, several of the most significant doctrines invoked to defeat it are not involved in petitioner Maxwell's case, and their permutations are so varied that their correction by this Court would require consideration of numerous cases exhibiting differing *voir dire* patterns and patterns of appellate reasoning. Meanwhile, as *Witherspoon* is consistently constricted by the state appellate courts, stays of execution based on *Witherspoon* claims are becoming increasingly difficult to secure—even in cases where, as is frequently not the situation, there exists a transcript of the *voir dire* examination that can be examined and made the basis of a post-conviction petition prior to a scheduled execution date.[1] Finally, in an appreciable number of death cases where stays of execution have been granted on the basis of the issues presented to this Court by petitioner Maxwell, no viable *Witherspoon* claim exists.[2]

[1] See the *Pinnello* case, in Petition for a Writ of Certiorari, *Pinnello and Pinnello v. New Jersey*, OT 1969, No. 18 Misc.; see also *Eskew v. State*, Ala. , 221 So. 2d 689 (1969).

[2] Unless, of course, this Court should undertake to decide the issue it expressly reserved in *Witherspoon*, whether any sort of

CONCLUSION

Petitioner Maxwell's death sentence is invalid under *Witherspoon v. Illinois*. But his controversy with the State of Arkansas does not stop there. Arkansas has sentenced petitioner to die, kept him on death row for seven years, once brought him within twenty-four hours of execution, and now threatens him with a retrial for his life—if his present sentence is vacated on *Witherspoon* grounds—pursuant to capital sentencing procedures whose conceded arbitrariness makes a mockery of the most rudimentary principles of constitutional due process.

More than four hundred men on the death rows of this Nation have been condemned to be electrocuted, gassed, or hanged pursuant to similar arbitrary procedures. Their lives have been held forfeit by a selective decisional process so lawless that no court sitting to enforce the Constitution's vaunted rule of law could for a moment countenance a like sort of decisional process for the disposition of any other issue, criminal or civil, consequential or trivial, committed by law to resolution by a legal tribunal. See the Brief for Petitioner herein, pp. 11-65.

The lives of many of these men now depend entirely upon this Court's timely consideration and proper adjud-

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death qualification of capital juries is constitutional. Significantly, the lower courts have without exception treated *Witherspoon* as approving the narrow form of death qualification whose validity the *Witherspoon* opinion was at pains not to determine. See cases cited in Appendix I, *infra*. But the present case offers a fitting vehicle for considering that question, since the plain *Witherspoon* requirements were not met here.

cation of the question of constitutionality of that arbitrary process. We urge the Court to decide the question now, and to strike the process down.

Respectfully submitted,

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APPENDIX A

Voir Dire Examination of Seven Veniremen Excused for Opposition to the Death Penalty

r. 116] -[*By the Court*:]

Does any other person have any reason why they can't become jurors?

Alright, Mr. Whittington, you may ask.

MR. WHITTINGTON [the prosecutor]: Mr. Kimball, the evidence convinced you beyond a reasonable doubt at conclusion of this trial that the defendant was guilty, t you thought a death sentence was justified, do you e any conscientious scruples that prevent your impos such a sentence?

A. No.

Tr. 117] Q. Mrs. Kanada, if you were convinced be- d a reasonable doubt at the conclusion of this trial that defendant was guilty, that you thought a death sen- ce was justified, would you have any conscientious uples about imposing the death sentence?

A. No sir.

Q. Mr. Groom, you have heard the question I just sed, do you entertain any such conscientious scruples inst the death sentence?

A. No.

Q. Mr. Martin, do you entertain any such scruples?

A. No.

Q. Mr. Beavers?

A. No, not at this point.

Q. Do you entertain any conscientious scruples about posing the death penalty?

A. No.

Q. Mr. Rima?

A. No.

Q. Mr. McCleary?

A. Yes. I am afraid I do.

Q. I submit, your Honor, that Mr. McCleary should be excused.

THE COURT: Alright, Mr. McCleary.

LET THE RECORD SHOW I EXCUSED, AGAINST DEATH-SENTENCE.

. . . . . .

[Tr. 159] MR. WHITTINGTON:

Q. Mrs. Wade, if you were convinced beyond a reasonable doubt of the guilt of the defendant and you felt the crime he committed was proved beyond a reasonably doubt and was so abhorent as to justify the death penalty would you have any conscientious scruples against the death penalty?

A. I would not sentence the death penalty.

MR. WHITTINGTON: I submit, your Honor, that Mrs. Wade should be excused.

LET THE RECORD SHOW MRS. WADE EXCUSED. DOES NOT BELIEVE IN THE DEATH PENALTY.

. . . . . .

[Tr. 160] MR. WHITTINGTON:

Q. Mrs. Hagy, if you were convinced beyond a reasonable doubt of the guilt of the defendant and you thought that this crime was so abhorent as to justify the death penalty would you entertain any conscientious scruples about inflicting the death sentence?

A. I don't believe in capitol punishment.

Q. You do not believe you could return a verdict of capitol punishment?

A. No sir, I don't believe in capitol punishment.

THE COURT: You will be excused.

LET THE RECORD SHOW MRS. HAGEY EXCUSED, DOES NOT BELIEVE IN CAPITOL PUNISHMENT.

. . . . . .

[Tr. 171] MR. WHITTINGTON:

Q. Mrs. Stroupe, . . .

. . . . . .

Q. If you were convinced beyond a reasonable doubt at the end of this trial that the defendant was guilty and that his actions had been so shocking that they would merit the death penalty do you have any conscientious scruples about capitol punishment that might prevent you from returning such a verdict?

A. I think I do.

MR. WHITTINGTON: I submit, your Honor, that the juror should be excused.

THE COURT: You may be excused.

LET THE RECORD SHOW MRS. STROUPE EXCUSED, AGAINST THE DEATH PENALTY.

. . . . . .

[Tr. 178] MR. WHITTINGTON:

Q. Mrs. Breland, if you were convinced that the defendant was guilty beyond a reasonable doubt at the end of this trial and that his actions had been so shocking and abhorent as to warrant the death penalty do you have any feelings about capitol punishment to prevent your returning such [Tr. 179] a verdict?

A. Yes, I think I do.

MR. WHITTINGTON: I submit, your Honor, that Mrs. Breland be excused.

THE COURT: You may be excused.

LET THE RECORD SHOW MRS. BRELAND EXCUSED, DOES NOT BELIEVE IN CAPITOL PUNISHMENT.

. . . . . .

[Tr. 181] MR. WHITTINGTON:

Q. Mr. Adams, do have any feeling concerning capitol punishment that would prevent you or make you have any feelings about returning a death sentence if you felt beyond a reasonable doubt that the defendant was guilty and that his crime was so bad as to merit the death sentence?

A. No, I don't believe in capitol punishment.

THE COURT: You will be excused Mr. Adams.

LET THE RECORD SHOW MR. ADAMS EXCUSED, DOES NOT BELIEVE IN CAPITOL PUNISHMENT.

. . . . . .

[Tr. 195] MR. WHITTINGTON:

Q. Mr. McAdams, do you have any conscientious scruples against capitol punishment?

A. I don't have scruples, I have convictions.

[Tr. 196] Q. What are they?

A. I am against capitol punishment.

THE COURT: You will be excused, Mr. McAdams.

LET THE RECORD SHOW MR. McADAMS EXCUSED, AGAINST CAPITOL PUNISHMENT.

. . . . . .

APPENDIX B

Voir Dire Examination of Venireman Rephan

[Tr. 164] MR. WHITTINGTON: Q. Mr. Rephan, . . .

. . . . . .

Mr. Mercer [defense counsel]: . . .

. . . . . .

[Tr. 166] Q. The Court will so instruct you if you are selected as a juror that it is the defendant's right not to take the witness stand if he so desires. Would the fact that this defendant would not take the stand as he so desires tend to cause you to believe that he might have something to hide, and therefore might be guilty?

A. I don't know how to answer that.

Q. The Court will instruct you that the defendant is presumed innocent until proven guilty beyond a reasonable doubt and that this presumption follows him throughout the trial. Now, say that the defendant did not desire to take the witness stand on his behalf, would this fact tend to cause you to give more credibility to the State's testimony and evidence and raise a presumption in your mind that the defendant might have something to hide?

A. It might. I really don't know, I can't say.

THE COURT: That is the first time that point has [Tr. 167] been raised here, as to whether or not the defendant might take the stand. I will say this to all the jurors, each of you at all times at arriving at a verdict base that verdict solely upon the law and will you be governed by the law as given to you by the Court? Will each one of you do that? If there isn't anyone who will do that I want to know it now. And using the law as given to you by the

Court and the evidence from the witness stand, will you base your verdict upon those two things, the law and the evidence? In other words, Mr. Rephan, if it becomes necessary and the Court does instruct you on whether or not the defendant takes the witness stand, will you in arriving at a verdict base your decision upon that law and not any opinion that you have?

A. Yes sir.

THE COURT: Proceed Mr. Mercer.

Q. You are saying you would not hold this against him?
A. There is a possibility that I might, that is hard to say.
Q. There is a possibility that it might?
A. That is hard to say.
Q. Pass the witness.

MR. WHITTINGTON:

Q. Mr. Rephan, if you are instructed by the Court as to the law of this case and the Court told you that you could not make anything from the fact that someone did not take the stand would you be able to follow that instruction and would you be able to put out of your mind any personal [Tr. 168] feeling that you might have, or any conclusion that you might draw from that act, and abide by that instruction given to you by the Court?

A. Yes sir.
Q. Do you feel you could give the defendant a fair trial?
A. I do.
Q. You don't have any prejudices that might affect your ability to give this defendant a fair trial?
A. I don't think I do.
Q. You would do your utmost to give him a fair trial?
A. Yes sir.

THE COURT: Mr. Rephan, you stated there that you thought you could do that. If it develops in this case and the Court would give an instruction whether or not the defendant does take the stand, which if the defendant does not take the stand the Court will give an instruction, would you substitute your feelings and your opinion for the instruction of the Court or would you be guided by the Instructions of the Court?

A. I would follow the instructions of the Court.

I want you to be sure of that, Mr. Rephan. This is very important as to whether or not at this time you feel if the defendant does not take the stand if you feel you might be just a little bias or prejudice against him because he didn't take the stand? I want you to be sure about that.

[Tr. 169] A. I can't be sure about it.

THE COURT: You would be the only one who would know, I wouldn't.

Q. I would abide by the law I am sure.

THE COURT: In other words, you would not substitute your opinion or feelings against what the Court told you the law was?

A. No sir.

.....

APPENDIX C

Treatment of *Witherspoon* v. *Illinois* by the Lower Courts

This appendix includes all of the cases we have found in which *Witherspoon* has been applied by the lower courts.[1]

A. *Decisions setting aside death sentences.*[2]

The California and Georgia Supreme Courts have each set aside a number of death sentences under *Witherspoon*, and a few other state courts have set aside a few. In each case, the death sentence was not definitively excluded by the court's decision; rather a new trial was ordered either of the issue of penalty alone (as in California and Georgia) or of the issues of guilt *and* penalty (as in Louisiana and Texas). It is interesting to note that the Georgia Supreme

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[1] Excepting only cases involving sentences less than death where a lower court has done no more than correctly to note that *Witherspoon* does not affect non-death cases.

[2] A number of decisions are reported in which federal habeas corpus courts have remanded death cases to the state courts for initial determination of a *Witherspoon* claim. *Brent* v. *White*, 398 F. 2d 503 (5th Cir. 1968); *Powers* v. *Hauck*, 399 F. 2d 322 (5th Cir. 1968); *Irving* v. *Breazeale*, 402 F. 2d 231 (5th Cir. 1968); *Garrison* v. *Patterson*, 405 F. 2d 696 (10th Cir. 1969). Cf. *Shinall* v. *Breazeale*, 404 F. 2d 785 (5th Cir. 1968) (remand to the district court). In the only one of those cases with which we are familiar, the State court thereafter rejected the *Witherspoon* ground. *Brent* v. *White*, 19th Judicial District Ct. of La., Crim. Div., No. 47,265, decided July 31, 1969.

In three cases known to us, federal courts have actually vacated death sentences under *Witherspoon*. *Spencer* v. *Beto*, 398 F. 2d 500 (5th Cir. 1968); *Williams* v. *Dutton*, 400 F. 2d 797 (5th Cir. 1968); *Rideau* v. *White*, E.D. La., Baton Rouge Div., Misc. No. 970, decided May 12, 1969.

Court has remanded for retrials as to penalty alone—thus inaugurating a system of separate trials of the penalty issue to avoid either definitive invalidation of a death sentence or an entirely new trial under *Witherspoon*—although that court has steadfastly maintained that separate penalty proceedings are impermissible under Georgia law whenever confronted with constitutional challenges to the single-verdict capital trial such as that made herein by petitioner Maxwell. See *Miller* v. *State*, 224 Ga. 627, 163 S.E. 2d 730 (1968).

In each decision vacating a death sentence and remanding for a new trial, the court has directed that jurors on retrial be death-qualified by the standards whose constitutionality was *reserved* in *Witherspoon*. Thus, *Witherspoon* has invariably been incorrectly read as *validating* the forms of death-qualification practice which it did not expressly *invalidate*—or, at the least, the state courts have proved absolutely unwilling to reconsider the validity of those forms in light of the logic and reasoning of the *Witherspoon* opinion.[3]

See:

In re Anderson and Saterfield, 69 Cal. 2d 613, 73 Cal. Rptr. 21, 446 P. 2d 117 (1968)

People v. *Risenhoover*, 70 Adv. Cal. 15, 73 Cal. Rptr. 553, 447 P. 2d 925 (1968)

People v. *Bradford*, 70 Adv. Cal. 347, 74 Cal. Rptr. 726, 450 P. 2d 46 (1969)

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[3] See Petition for a Writ of Certiorari, *Forcella and Funicello* v. *New Jersey*, O.T. 1969, No. 18 Misc., pp. 69-74; Petition for a Writ of Certiorari, *Anderson et al.* v. *California*, O.T. 1969, No. 60 Misc., pp. 52-57; and Mr. Justice Peters' dissenting opinion in *People* v. *Tolbert*, 70 Adv. Cal. 844, 867, 76 Cal. Rptr. 445, 458, 452 P. 2d 661, 674 (1969).

People v. *Sears,* 70 Adv. Cal. 485, 74 Cal. Rptr. 872, 450 P. 2d 248 (1969)

In re Mathis, 70 Adv. Cal. 501, 74 Cal. Rptr. 914, 450 P. 2d 290 (1969)

People v. *Teale,* 70 Adv. Cal. 532, 75 Cal. Rptr. 172, 450 P. 2d 564 (1969)

People v. *Fain,* 70 Adv. Cal. 625, 75 Cal. Rptr. 633, 451 P. 2d 65 (1969)

People v. *Morse,* 70 Adv. Cal. 762, 76 Cal. Rptr. 391, 452 P. 2d 607 (1969)

People v. *Osuna and Gorman,* 70 Adv. Cal. 811, 76 Cal. Rptr. 462, 452 P. 2d 678 (1969)

People v. *Goodridge,* 70 Adv. Cal. 878, 76 Cal. Rptr. 421, 452 P. 2d 637 (1969)

In re Eli, 71 Adv. Cal. 227, 77 Cal. Rptr. 665, 454 P. 2d 337 (1969)

People v. *O'Brien,* 71 Adv. Cal. 415, 78 Cal. Rptr. 202, 455 P. 2d 138 (1969)

People v. *Vaughn,* 71 Adv. Cal. 423, 78 Cal. Rptr. 186, 455 P. 2d 122 (1969)

People v. *Quicke,* 71 Adv. Cal. 521, 78 Cal. Rptr. 683, 455 P. 2d 787 (1969)

In re Seiterle, 71 Adv. Cal. 722, 78 Cal. Rptr. 857, 456 P. 2d 129 (1969)

People v. *Ketchel,* 71 Adv. Cal. 659, 79 Cal. Rptr. 92, 456 P. 2d 660 (1969)

People v. *Williams,* 71 Adv. Cal. 637, 79 Cal. Rptr. 65, 456 P. 2d 633 (1969)

People v. *Schader,* 71 Adv. Cal. 797, —— Cal. Rptr. ——, —— P. 2d —— (1969)

People v. *Stanworth,* 71 Adv. Cal. 858, —— Cal. Rptr. ——, —— P. 2d —— (1969)

People v. *Gardner,* 71 Adv. Cal. 882, —— Cal. Rptr. ——, —— P. 2d —— (1969)

In Re Hillery, 71 Adv. Cal. 896, —— Cal. Rptr. ——, —— P. 2d —— (1969)

Miller v. *State*, 224 Ga. 627, 163 S.E. 2d 730 (1968)
Dixon v. *State*, 224 Ga. 636, 163 S.E. 2d 737 (1968)
Massey v. *Smith*, 224 Ga. 721, 164 S.E. 2d 786 (1968)
Arkwright v. *Smith*, 224 Ga. 764, 164 S.E. 2d 796 (1968)
Williams v. *Smith*, 224 Ga. 800, 164 S.E. 2d 798 (1968)
Jones v. *State*, 224 Ga. 782, 164 S.E. 2d 831 (1968)
Alexander v. *State*, —— Ga. ——, 168 S.E. 2d 315 (1969)
State v. *Turner*, 220 So. 2d 67 (La. 1969)
State v. *Benjamin*, 222 So. 2d 853 (La. 1969)
Rouse v. *State*, —— Miss. ——, 222 So. 2d 145 (1969)
State v. *Spence*, 274 N.C. 536, 164 S.E. 2d 593 (1968)
Ellison v. *State*, 432 S.W. 2d 955 (Tex. Cr. App. 1968)
Ex parte Bryan, 434 S.W. 2d 123 (Tex. Cr. App. 1968)[4]

B. *Decisions refusing to set aside death sentences*

In all cases found other than those just cited, lower courts have discovered some means to avoid *Witherspoon*. We attempt below to categorize the rules and doctrines in avoidance.

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[4] See also *Evans* v. *State*, 430 S.W. 2d 502 (Tex. Cr. App. 1968), reversing for failure of the trial court to have *voir dire* examination transcribed on request; *Aaron* v. *State*, 283 Ala. 52, 214 So. 2d 327 (1968), remanding for consideration of the *Witherspoon* issue by the trial court.

1. *Doctrines distinguishing or "construing" Witherspoon*:

a. *The "different atmosphere" doctrine.* The *Witherspoon* decision is said to rest entirely on the fact that the trial judge in that case *rushed* to sweep the jury of conscientious objectors. Cases in which the presiding judge is more deliberate on the *voir dire*—albeit equally effective in excluding the same veniremen—present a "different atmosphere." In cases with a "different atmosphere," the precise, carefully articulated standards whose elaboration comprises the bulk of the *Witherspoon* opinion are said to be simply "not binding" on state courts. *People* v. *Speck*, 41 Ill. 2d 177, 227, 242 N.E. 2d 208 (1968). See also *People* v. *Mallett*, —— Ill. 2d ——, 244 N.E. 2d 129 (1969); *People* v. *Moore*, 42 Ill. 2d 73, 246 N.E. 2d 299 (1969); *Jaggers* v. *Commonwealth*, 439 S.W. 2d 580 (Ky. 1968); *State* v. *Mathis*, 52 N.J. 238, 245 A. 2d 20 (1968); *Brent* v. *White*, 19th Judicial District Ct. of La., Crim. Div., No. 47,265, decided July 31, 1969. *Cf. Bell* v. *Patterson*, 402 F. 2d 394 (10th Cir. 1968).

b. *The "different statute" doctrine.* The highest courts of three States have purported to distinguish *Witherspoon* in whole or in part upon the ground that their state statutes differ from Illinois' in that their statutes disqualify only jurors whose scruples would prevent them from finding the defendant *guilty*. *Wilson* v. *State*, 225 So. 2d 321 (Fla. 1969); *Williams* v. *State*, Fla. Sup. Ct., No. 37,316, decided April 23, 1969; *Howard* v. *State*, —— Nev. ——, 446 P. 2d 163 (1968) (dictum); *Koonce* v. *State*, Okla. Ct. Crim. App., No. A-14,826, decided May 21, 1969. These stat-

utes are, of course, of the sort which the *Witherspoon* opinion noted are sometimes not construed as meaning what they say (391 U.S., at 513-514, n. 5, citing Florida and Nevada decisions); and, in fact, in all three States the statutes have been consistently read—both before and after the explanation that they squared with *Witherspoon* because directed to "guilt"-qualification—as allowing disqualification of jurors whose scruples would affect only their votes on penalty, not guilt. *Piccott* v. *State*, 116 So. 2d 626 (Fla. 1959); *Pitts* v. *State*, 185 So. 2d 164 (Fla. 1966); *Sims* v. *State*, 184 So. 2d 217 (Fla. Dist. Ct. App. 1966); and see the *voir dire* practice reflected in *Abram* v. *State*, 216 So. 2d 498 (Fla. Dist. Ct. App. 1968). *State* v. *Williams*, 50 Nev. 271, 257 Pac. 619 (1927); *Spillers* v. *State*, —— Nev. ——, 436 P. 2d 18 (1968); *Walker* v. *State*, —— Nev. ——, 455 P. 2d 34 (1969). And see the exclusions sustained in the *Koonce* case itself.

c. *The doctrine that* Witherspoon *could not have been intended to deprive the prosecution of an "impartial" jury on the question of penalty; that a juror's "impartiality" must appear affirmatively; therefore, that exclusion of equivocal veniremen is proper.* This doctrine, which stands the "unmistakably clear" formulation of *Witherspoon* on its head, began with *State* v. *Mathis*, 52 N.J. 238, 245 A. 2d 20 (1968). See also *Williams* v. *State*, Fla. Sup. Ct., No. 37,316, decided April 23, 1969; *Campbell* v. *State*, Fla. Sup. Ct., No. 35,622, decided June 11, 1969; *State* v. *Atkinson*, —— N.C. ——, 167 S.E. 2d 241 (1968); *Pittman* v. *State*, 434 S.W. 2d 352 (Tex. Cr. App. 1968); *cf. Davis* v. *State*, —— Ark. ——, 440 S.W. 2d 244 (1969); *Koonce* v. *State*, Okla. Ct. Crim. App., No. A-14,826, decided

May 21, 1969. But see *People* v. *Chacon*, —— Cal. 2d ——, 73 Cal. Rptr. 10, 447 P. 2d 106 (1968); *People* v. *Osuna and Gorman*, *supra*.

d. *The doctrine construing* Witherspoon *to permit disqualification of a juror who would not vote for the death penalty in the particular case being tried, although he could vote for death in another sort of case.* See *Jaggers* v. *Commonwealth*, 439 S.W. 2d 580 (Ky. 1968); *State* v. *Forcella*, 52 N.J. 263, 245 A. 2d 181 (1968); *State* v. *Peele*, 274 N.C. 106, 161 S.E. 2d 568 (1968); *Pittman* v. *State*, 434 S.W. 2d 352 (Tex. Cr. App. 1968); *Smith* v. *State*, 437 S.W. 2d 835 (Tex. Cr. App. 1968). But see 391 U.S., at 522 n. 21.

(e. And the Maryland Court of Special Appeals has suggested that *Witherspoon* may have no application in that State, because a capital jury in Maryland merely *recommends* and does not *impose* the death sentence. *Veney* v. *State*, 251 Md. 182, 246 A. 2d 568 (1968). But see 391 U.S., at 518, n. 12; *id.*, at 522.)

2. *Methods of interpreting a* voir dire *transcript so as to avoid* Witherspoon:

a. *Distinguishing* Witherspoon *if the trial judge conducted any sort of inquiry going beyond general opposition to capital punishment.* The nature of the inquiry and of the juror's response are in this view apparently immaterial. *Segura* v. *Patterson*, 402 F. 2d 249 (10th Cir. 1968); *People* v. *Mallett*, —— Ill. 2d ——, 244 N.E. 2d 129 (1969); *State* v. *Pruett*, 18 Ohio St. 2d 167, 248 N.E. 2d 605 (1969) (*semble*).

b. *According deference to the trial court's interpretation of a venireman's responses in ruling on chal-*

lenges for cause. This constructional canon—proper enough in its place, of course—is consistently applied to the construction of *voir dire* proceedings conducted prior to the date of *Witherspoon*, at a time when the trial judge would not in fact have been using proper *Witherspoon* standards. The court that applies the canon usually does so in an opinion that retroactively rewrites the pre-*Witherspoon* law of the State as consistent with *Witherspoon*. *State* v. *Mathis*, 52 N.J. 238, 245 A. 2d 20 (1968); *State* v. *Forcella*, 52 N.J. 263, 245 A. 2d 181 (1968); *Pittman* v. *State*, 434 S.W. 2d 352 (Tex. Cr. App. 1968); *State* v. *Aiken*, —— Wash. 2d ——, 452 P. 2d 232 (1969).

c. *Observing that "no particular form of words" is necessary to satisfy* Witherspoon. In practice, this means that most any form of words, however far from the mark, will satisfy *Witherspoon*. *People* v. *Speck*, 41 Ill. 2d 177, 242 N.E. 2d 208 (1968); *Koonce* v. *State*, Okla. Ct. Crim. App. No. A-14,826, decided May 21, 1969; *Pittman* v. *State*, 434 S.W. 2d 352 (Tex. Cr. App. 1968); *State* v. *Aiken*, —— Wash. 2d ——, 452 P. 2d 232 (1969); *cf. People* v. *Varnum*, 70 Adv. Cal. 514, 75 Cal. Rptr. 161, 450 P. 2d 533 (1969).

3. *Methods of avoiding* Witherspoon *where jurors were unmistakably excluded in violation of the rule of that decision:*

a. *The determination that because only a few jurors were unconstitutionally excluded, the requisite representative quality of the jury was not destroyed.* *Bell* v. *Patterson*, 402 F. 2d 394 (10th Cir. 1968); *State* v. *Mathis*, 52 N.J. 238, 245 A. 2d 20 (1968); *State* v. *Wigglesworth*, 18 Ohio St. 2d 171, 248 N.E. 2d 607

(1969) (alternative ground, *semble*); *Scott* v. *State*, 434 S.W. 2d 678 (Tex. Cr. App. 1968). *Contra*: *People* v. *Fain*, 70 Adv. Cal. 625, 75 Cal. Rptr. 633, 451 P. 2d 65 (1969); *Miller* v. *State*, 224 Ga. 627, 163 S.E. 2d 730 (1968); pp. 22-24 *supra*.

b. *The observation that unexhausted prosecutorial peremptories outnumbered unconstitutionally excluded veniremen.* Announced as a "relevant makeweight" in *State* v. *Mathis*, 52 N.J. 238, 245 A. 2d 20 (1968), this consideration frequently appears as an alternative ground of decision. *Campbell* v. *State*, Fla. Sup. Ct., No. 35,622, decided June 11, 1969; *People* v. *Speck*, 41 Ill. 2d 177, 242 N.E. 2d 208 (1968); *People* v. *Mallett*, —— Ill. 2d ——, 244 N.E. 2d 129 (1969); *People* v. *Moore*, 42 Ill. 2d 73, 246 N.E. 2d 299 (1969); *State* v. *Wigglesworth*, 18 Ohio St. 2d 171, 248 N.E. 2d 607 (1969); *Scott* v. *State*, 434 S.W. 2d 678 (Tex. Cr. App. 1968). Except in the California Supreme Court, *In re Anderson*, 69 Cal. 2d 613, 73 Cal. Rptr. 21, 446 P. 2d 117 (1968); *People* v. *Sears*, 70 Adv. Cal. 485, 74 Cal. Rptr. 782, 450 P. 2d 248 (1969), no notice seems to be taken of the palpable unconstitutionality of a *conclusive judicial presumption* that the prosecutor will *systematically* employ his peremptories to exclude from the jury a class of persons that this Court has held cannot be excluded. But see *Swain* v. *Alabama*, 380 U.S. 202, 222-228 (1965).

c. *The observation that defense counsel did not object, or did not inquire further regarding the excluded jurors' attitudes, or did not express his dissatisfaction with the jury by exhausting his own peremptories.* This, also, is usually an alternative ground of decision. *State* v. *Peele*, 274 N.C. 106, 161 S.E. 2d 568 (1968);

State v. *Wigglesworth*, 18 Ohio St. 2d 171, 248 N.E. 2d 607 (1969); *Pittman* v. *State*, 434 S.W. 2d 352 (Tex. Cr. App. 1968); *Scott* v. *State*, 434 S.W. 2d 678 (Tex. Cr. App. 1968). *Contra*: the *Anderson* and *Sears* cases cited in the preceding paragraph.

d. *Miscellaneous procedural grounds*: *State* v. *Crook*, 221 So. 2d 473 (La. 1969); *Duisen* v. *State*, 441 S.W. 2d 688 (Mo. 1968); *Baker* v. *State*, 225 So. 2d 327 (Fla. 1969); *Lokos* v. *State*, —— Ala. ——, 221 So. 2d 689 (1969).

4. *Decisions articulating relatively unimpeachable* Witherspoon *standards but manifestly misapplying them*: *Segura* v. *Patterson*, 402 F. 2d 249 (10th Cir. 1968); *State* v. *Atkinson*, —— N.C. ——, 167 S.E. 2d 241 (1969). A common ground of misconstruction of the *voir dire* resides in taking literally a juror who says that his scruples will affect his ability to return a "guilty" verdict, although, in the context of the applicable state law, verdict forms and/or *voir dire* questioning, a "guilty" verdict means an *unqualified* guilty verdict—that is, a vote for the death penalty. See *Wilson* v. *State*, 225 So. 2d 321 (Fla. 1969); *Furman* v. *State*, —— Ga. ——, 167 S.E. 2d 628 (1969); *cf. State* v. *Forcella*, 52 N.J. 263, 245 A. 2d 181 (1968); *Veney* v. *State*, 251 Md. 182, 246 A. 2d 568 (1968). It should be noted that even the California Supreme Court, which has given the most generous reception to *Witherspoon* of any state court, permits disqualification of veniremen for scruples without instructing them that state law requires them as jurors to consider the death penalty, and then inquiring whether they are able to subordinate their scruples to this duty. *People* v. *Beivelman*, 70 Adv. Cal. 37, 73 Cal. Rptr. 521, 447 P. 2d 913 (1968); *People* v. *Durham*,

70 Adv. Cal. 179, 74 Cal. Rptr. 262, 449 P. 2d 198 (1969); *People* v. *Hill*, 70 Adv. Cal. 723, 76 Cal. Rptr. 225, 452 P. 2d 329 (1969); *People* v. *Varnum*, 70 Adv. Cal. 514, 75 Cal. Rptr. 161, 450 P. 2d 553 (1969); *People* v. *McGautha and Wilkinson*, 70 Adv. Cal. 823, 76 Cal. Rptr. 434, 452 P. 2d 650 (1969); *People* v. *Tolbert*, 70 Adv. Cal. 844, 76 Cal. Rptr. 445, 452 P. 2d 661 (1969); *People* v. *Coogler*, 71 Adv. Cal. 165, 77 Cal. Rptr. 790, 454 P. 2d 686 (1969); *People* v. *Nye*, 71 Adv. Cal. 376, 78 Cal. Rptr. 467, 455 P. 2d 395 (1969) (defense counsel's interrogation, in addition, was unduly restricted); *People* v. *Miller*, 71 Adv. Cal. 477, 78 Cal. Rptr. 449, 455 P. 2d 377 (1969).

5. *Opaque decisions*: In these cases refusing to vacate death sentences it is impossible to evaluate the application made of *Witherspoon*, since not enough appears from the respective opinions to appraise the courts' characterization of the *voir dire* (or relevant parts of it) as consistent with *Witherspoon* standards. *Sims* v. *Eyman*, 405 F. 2d 439 (9th Cir. 1969); *People* v. *Mabry*, 71 Adv. Cal. 448, 78 Cal. Rptr. 655, 455 P. 2d 759 (1969); *People* v. *Pike*, 71 Adv. Cal. 617, 78 Cal. Rptr. 672, 455 P. 2d 776 (1969); *Whisman* v. *State*, 224 Ga. 793, 164 S.E. 2d 719 (1968); *State* v. *Hudson*, 221 So. 2d 484 (La. 1969); *Walker* v. *State*, —— Nev. ——, 455 P. 2d 34 (1969); *State* v. *Crampton*, 18 Ohio St. 2d 182, 248 N.E. 2d 614 (1969); *Quintana* v. *State*, 441 S.W. 2d 191 (Tex. Cr. App. 1969); *State* v. *Smith*, —— Wash. 2d ——, 446 P. 2d 571 (1968).

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 13

WILLIAM L. MAXWELL,

Petitioner,

—v.—

O. E. BISHOP, Superintendent of Arkansas State Penitentiary,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITIONER'S MOTION FOR ENLARGEMENT OF THE GRANT OF *CERTIORARI*

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PETITIONER'S MOTION FOR ENLARGEMENT OF THE GRANT OF *CERTIORARI*

In this capital case, *certiorari* was sought on three related issues challenging the administration of the death penalty for the crime of rape in the State of Arkansas. Petitioner asked the Court to determine whether (1) unconstitutional racial discrimination in the verdicts of life or death handed down by Arkansas juries had been proved and was unrebutted on this record; (2) the arbitrary power committed by state law to capital jurors, enabling them to decide the question of life or death lawlessly and capriciously, and to discriminate on racial or other invidious grounds if they so choose, immune against review or correction of any sort, was itself unconstitutional; and (3) the single-verdict capital trial procedure, which deprives the jury of information prerequisite to rational sentenc-

ing choice except at the cost of destruction of the defendant's privilege against self-incrimination and severe prejudice to him on the issue of guilt or innocence, was (standing alone or in combination with the arbitrary sentencing discretion just described) unconstitutional. We respectfully refer the Court to pp. 2-4 of the Petition for a Writ of Certiorari for the detailed phrasing of each question.

Certiorari was granted on December 16, 1968, limited to the second and third questions. The case was argued early in March of 1969 and was ordered restored to the calendar for reargument at the end of May. In advance of that reargument, we now move that the order granting *certiorari* be enlarged to include the first of the described questions as well.

We must candidly admit that our reasons for believing this issue worthy of review by the Supreme Court of the United States are no different than they were in 1968. The present record presents, we think, a plain and solid case of racial discrimination in its most vicious form. It documents what knowledgeable observers have long known: that juries in those few, largely Southern, jurisdictions which retain the death penalty for rape consistently discriminate on grounds of race in deciding whether men shall live or die. It was the purpose of a Constitutional Amendment now one hundred years old to end forever this invidious practice of systematically subjecting one race to punishments more severe than those customarily meted out to the other. And whatever excuse—we do not say justification—might ever be found for allowing racial discrimination to go uncorrected in the administration of any governmental function, we submit there can be none for blinking discrimination in the matter of taking human life.

Our reason for venturing to renew our request that the Court consider this question is simple enough. The case has now been once argued and submitted, considered by the Court, and ordered reargued. Obviously, the Court now has greater familiarity with the record, with the issues in the case, and with their interrelationship, than would have been possible on the *certiorari* papers in December, 1968. We can do no more—nor less, in a matter of this importance—than to ask the Court's judgment, upon the further study it has given the case, whether the racial discrimination question presented does not warrant its review equally with the other vital issues herein.

Accordingly, we respectfully move that the scope of the Court's writ of *certiorari* be enlarged to include Question 1 of the petition for the writ. See Petition for Writ of Certiorari, pp. 2-33, 35-58.

Respectfully submitted,

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O. E. BISHOP, Superintendent of Arkansas State Penitentiary,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

BRIEF FOR AMICUS CURIAE CLINTON DUFFY.

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IN THE

Supreme Court of the United States

October Term, 1969
No. 13

WILLIAM L. MAXWELL,

Petitioner,

vs.

O. E. BISHOP, Superintendent of Arkansas State Penitentiary,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

BRIEF FOR AMICUS CURIAE CLINTON DUFFY.

Opinions Below.

The opinion of the United States District Court for the Eastern District of Arkansas denying petitioner's application for a writ of habeas corpus is reported at 257 F. Supp. 710. It appears in the Appendix to the Brief for Petitioner at 20-41. The opinion of the United States Court of Appeals for the Eighth Circuit affirming the District Court's denial is reported at 398 F. 2d 138, and appears in the Appendix at 43-74.

The opinion of the Supreme Court of Arkansas affirming petitioner's conviction of the crime of rape and the sentence of death is found *sub nom. Maxwell v. State*, 236 Ark. 694, 370 S.W. 2d 113 (1963). Opinions on disposition of an earlier application for habeas corpus are found *sub nom. Maxwell v. Stephens*, 229 F. Supp. 205 (E.D. Ark. 1964), *aff'd*, 348 F. 2d 325 (8th Cir. 1965), *cert. denied*, 382 U.S. 944 (1965).

Jurisdiction.

Jurisdiction was conferred on the District Court by 28 U.S.C. §2241(c)(3) (1964). Jurisdiction was conferred on the Court of Appeals by 28 U.S.C. §§1291, 2253 (1964). The jurisdiction of this Court is founded upon 28 U.S.C. §1254(1) (1964).

The judgment of the Court of Appeals was entered on July 11, 1968. (See Appendix 75.) The petition for a writ of certiorari was filed with this Court on October 9, 1968, and was granted on December 16, 1968 (see Appendix 76), limited to Questions 2 and 3 of the petition. After this matter was argued before this Court during the 1968-69 term, the case was set over to the 1969-70 term of the Court for further argument.

Questions Presented.

Certiorari was granted with respect to the following questions:

1.

Whether Arkansas' practice of allowing capital trial juries absolute discretion, uncontrolled by standards or directions of any kind, to impose the death penalty upon a defendant convicted of the crime of rape, vio-

lates the Due Process Clause of the Fourteenth Amendment?

II.

Whether Arkansas' single-verdict procedure, which requires a jury to determine guilt and punishment simultaneously in a capital case, and thus requires a capital defendant to elect between the exercise of his privilege against self-incrimination and the presentation of evidence requisite to rational sentencing choice, violates the Fifth and Fourteenth Amendments?

Amicus believes that the following questions are either closely allied to the above questions or present issues which ought rightfully to be considered by the Court:

A. Whether Arkansas' practice of allowing capital trial juries absolute discretion, uncontrolled by standards or directions of any kind, to impose the death penalty upon a defendant convicted of the crime of rape violates the Due Process Clause of the Fourteenth Amendment and violates the Eighth Amendment's proscription against cruel and unusual punishments, which proscription is encompassed by the Fourteenth Amendment?

B. Whether, in any circumstances short of death of the victim, a State Legislature may impose the penalty of death for the crime of rape without offending the constitutional proscription against cruel and unusual punishments?

C. Whether, in any circumstances, a State Legislature may impose the penalty of death without offending the constitutional proscription against cruel and unusual punishments?

Constitutional and Statutory Provisions Involved.

The case involves the Fourteenth Amendment to the Constitution of the United States, and the Fifth and Eighth Amendments which are incorporated within the Fourteenth Amendment.

The statutes involved are: *Arkansas Statutes Annotated* §§ 41-3403, 43-2153 (1964 Repl. vol.), which provide, respectively, as follows:

> 41-3403. *Penalty for Rape.*—Any person convicted of the crime of rape shall suffer the punishment of death [or life imprisonment].
>
> 43-2153. *Capital cases—Verdict of Life Imprisonment.*—The jury shall have the right in all cases where the punishment is now death by law, to render a verdict of life imprisonment in the State penitentiary at hard labor.

Interest of the Amicus Curiae.

The parties have consented to the filing of this *amicus curiae* brief; copies of their letters of consent are being submitted to the clerk with the brief.

Clinton T. Duffy is a former warden of San Quentin prison. He has personally witnessed over ~~500~~ 150 executions. Through years of first hand experience with the death penalty, its application, and its victims, he has become a confirmed opponent of capital punishment. He has authored several books on this subject, and, in 1966, he was a delegate to the third United Nations Congress on the prevention of crime and the treatment of offenders. In recognition of his expertise, he was called to testify before a subcommittee of the United States Senate, on March 20, 1968, in connection with

legislation proposed to abolish the death penalty. Excerpts from his testimony appear in an appendix to this brief.

Since retiring from San Quentin, Warden Duffy has devoted his time and energy to the abolition of the death penalty. His experience has convinced him that capital punishment is inhuman and barbaric and that it serves no useful purpose in enforcement of the law or in society.

It is the position of *Amicus* that the Arkansas practice of allowing capital trial juries absolute discretion in imposing the death penalty, without standards, not only violates the due process clause of the Fourteenth Amendment, as contended by petitioner, but also constitutes a cruel and unusual punishment forbidden by the Eighth Amendment as made applicable to the states by the Fourteenth Amendment.[1]

Amicus also contends that certain other applications of the Eighth Amendment render the death sentence in this case unconstitutional. Although these applications may not fall squarely within the precise questions upon which the petition for a writ of certiorari was granted, *Amicus* believes that they are closely allied to the certiorari questions in certain respects and in other respects present questions germane to the ultimate issue of the petitioner's fate, so that it is appropriate that the Court consider these very substantial constitutional issues.

---

[1]The United States Supreme Court applied the cruel and unusual punishments clause of the Eighth Amendment to the States through the Fourteenth Amendment in *Robinson v. California*, 370 U.S. 660 (1962). See also *Johnson v. Dye*, 175 F. 2d 250, 256 (3rd Cir. 1949), *rev'd.* on other grounds, 338 U.S. 864 (1949).

Since we can add nothing meaningful to the petitioner's arguments relating to the Fifth and Fourteenth Amendment questions, we shall not plough the same field. We confine our arguments to consideration of the Eighth Amendment.

Although there have been cases containing dicta that the death penalty does not necessarily offend constitutional inhibitions against cruel and unusual punishments (*see generally Wilkerson v. Utah*, 99 U.S. 130, 134-135 (1878); *In re Kemmler*, 136 U.S. 436, 447 (1890); *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 464 (1947); *Trop v. Dulles*, 356 U.S. 86, 99 (1958)), this Court has never specifically held that the death penalty does not violate the proscription against cruel and unusual punishments. Moreover, this Court has never discussed the constitutionality of a sentence of death when imposed by a jury uncontrolled by standards or directions of any kind. Nor has the Court discussed whether the death sentence for a crime other than murder constitutes cruel and unusual punishment. *Amicus* respectfully submits that the time has come for the Court to face the issue squarely and to announce that, consistent with our standards of civilization, neither this petitioner nor any other person shall be put to death as a punishment for crime.

Summary of Argument.

The constitutional proscriptions against cruel and unusual punishments apply to the manner in which the punishment is selected, as well as to the degree of the punishment itself. The unregulated power of an Arkansas jury, unguided by any standards, to choose between life and death for a defendant, constitutes cruel and

unusual punishment because its very capriciousness is cruel and unusual, because it necessarily subjects the defendant to an impermissible punishment in the form of a courtroom version of Russian Roulette, and because it precludes rational inquiry into circumstances which might render the death penalty excessively cruel in a particular case.

Regardless of the procedures employed by the state, we contend that imposition of the death penalty for the crime of rape constitutes cruel and unusual punishment *per se*. The Eighth Amendment embodies within it the principle that the punishment must be in proportion to the offense; under the evolving standards of decency test, the taking of petitioner's life for a crime which did not itself involve the taking of any other life would constitute cruelly excessive punishment in violation of the constitutional prohibition.

Finally, *Amicus* will argue that death, as a punishment for any crime, is repugnant to a civilized democratic nation. Capital punishment represents a carry-over from days of retribution and vengeance which this society has now outgrown. Since the state has not shown that death sentences are a greater deterrent than life imprisonment, or that they serve any other legitimate concern of society, capital punishment has no legitimate penal purpose. Under our evolving standards of decency, the death penalty has become both inherently and unnecessarily cruel, and it is inconsistent with the mandate of the Eighth Amendment as applied to the states.

I.

The Death Penalty for the Crime of Rape, When Imposed by a Jury Which Is Uncontrolled by Standards of Any Kind in Its Choice of Punishment, Constitutes Cruel and Unusual Punishment Proscribed by the Fourteenth Amendment.

Regardless of whether it may be constitutionally impermissible to impose the death penalty for rape, or to impose the death penalty for any crime, as we contend *infra*, the procedures employed by the State of Arkansas in sentencing William Maxwell to death by electrocution render that sentence a cruel and unusual punishment.

This Court stated in *Trop v. Dulles*, 356 U.S. 86, 100 (1958):

> "The basic concept underlying the Eighth Amendment is nothing less than the dignity of man. While the State has the power to punish, the Amendment stands to assure that this power be exercised within the limits of civilized standards."

These civilized standards impose limits upon the process of the law, as well as upon its penalties, for, as Justice Frankfurter noted, the form of the criminal process itself can be "a form of cruelty or oppression" protected against by the Eighth Amendment. *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 556 (1943) (concurring opinion) (succession of trials).

The Eighth Amendment is directed against an arbitrary and capricious punishment, as well as against a punishment which is considered inherently cruel. It has been noted:

> "Closely related to proportionality are considerations of an 'equal protection' nature. If one de-

> fendant receives a punishment far more severe than those imposed upon others who have committed the same crime—evidence in itself that his punishment may be disproportionate—important questions of fairness and of a possible arbitrary use of the power to sentence are raised. Such punishment, even if within what might be considered a permissible range of penalties and though involving no torture or brutality, might well violate prevailing standards of decency."

Note, "The Cruel and Unusual Punishment Clause and the Substantive Criminal Law," 79 Harv. L. Rev. 635, 636 (1966).

Petitioner has demonstrated in his brief at pages 24-44 that the death penalty is unevenly, arbitrarily and discriminatorily applied. Unquestionably, petitioner has been sentenced to death for a crime for which most other offenders, even in Arkansas, receive far lesser penalties. Perhaps the most significant factor contributing to this phenomenon is the power of the jury, unguided by any standards and unreviewable by any court, to impose the death penalty in its unfettered discretion.

The Arkansas legislature has apparently determined that either death or life imprisonment may be the appropriate penalty for rape in any particular case. Life or death—a matter of highest significance—is apparently of insignificant difference to the Arkansas Legislature. It leaves the choice entirely to the jury. And it does so without formulating any standards to assist the jury in making such a determination; it gives the jury no guidance—not even a clue as to its purpose in requiring it to make the choice. Neither legislator nor

judge in Arkansas has suggested any factors which might be deemed exacerbating or mitigating, or even enunciated those factors which are to be deemed relevant and permissible criteria for decision-making, and those which are irrelevant and impermissible.

This legislative indifference to life or death, as evidenced by the complete lack of jury guidance, is shocking. It evidences a level of civilization far below the standards set by the Constitution. In this situation, "much more is involved here than a simple determination of sentence. For the State . . . empowers the jury in this case to answer 'yes' or 'no' to the question whether this defendant was 'fit to live.'" *Witherspoon v. Illinois*, 391 U.S. 510, 521 n. 20 (1968).

In some states the crime of rape has been divided into degrees. *See, e.g.*, 2 N.D. Century Code Annot. 12-30.04 through 12-30.09 (1960). *State v. Nagel*, 28 N.W. 2d 665, 75 N.D. 49 (1947). In some states rape may even be misdemeanor. See Ky. Rev'd Stats. §435.100 (1962). *Cannon v. Commonwealth*, 291 Ky. 500, 165 S.W. 2d 44 (1942). Hence, it is recognized that there are degrees of culpability for this crime.

But in Arkansas, rape is not divided into degrees. The charge against the defendant is the same, whether his victim is ten years old or thirty-five; whether she is seriously injured or, except for the unconsented sexual contact, she is physically unharmed; what the psychological effects were to the prosecutrix; whether the assailant endangered her life by use of a weapon, or whether he intimidated her by pure physical force; whether the defendant was a prowler or a former friend of the victim.

Given the extremely broad coverage of its statute, it is all the more disturbing that Arkansas has not deigned to prescribe some guidelines for making this most awesome of decisions. The unrestricted power of an Arkansas jury sitting in a rape case to decide, without standards or limitations, indeed without the slightest guidance, whether the defendant shall live or be killed violates the Eighth Amendment in at least three ways.

First, the defendant is subjected, not to measured punishment which represents a rational response on the part of the State to the defendant's anti-social act, but rather to the unfettered and unguided, and hence potentially irrational response of twelve men. These twelve men may decide whether the defendant shall live or die on the basis of what, to some men, would seem to be good and rational reasons; or on the contrary, they may fix the penalty on the basis of what, to the vast majority of men, would seem impermissible discrimination. Indeed, the decision-making factors may be completely irrational, such as the flip of a coin, the casting of a horoscope, or a belief in phrenology. The legislature evidently believes there are some cases in which the death penalty may be inappropriate; yet one juror may vote for a death sentence because he believes that all rape should be punished by death, while another actually believes that life imprisonment is a penalty more severe than execution. *See* the discussion of *Boone v. State*, 230 Ark. 821, 825-826, 327 S.W. 2d 87, 89-90 (1959) in petitioner's brief at 29 n.28. And, to put the matter closer to the case at bar, a juror could feel that death is the appropriate penalty where a black has committed rape on a white woman, and not in any other circumstances. So far as the Ar-

kansas legislature is concerned, the juror could rightfully believe that such a choice is permissible. So far as the Constitution of the United States is concerned, this choice cannot be permitted.

Our example is not fanciful. Indeed, petitioner has cited a number of statistics and studies which demonstrate that there is no correlation other than possibly race and poverty, to the imposition of the death penalty. See also Comment, "A Study of the California Penalty Jury in First-Degree-Murder Cases," 21 Stan. L. Rev. 1297 (1969).[9]

This Court would surely not countenance a method of marking those who must die and those who may live after a roll of the dice; nor would the Court permit the execution of every fiftieth defendant convicted of rape without regard to the facts of the particular case. Equally impermissible, would be a poll of the first twelve men in the street, selected by the clerk of the trial court, to choose whether a convicted man should live or die. And yet, is what Arkansas has done to William Maxwell markedly different?

[9] In the Federal courts, subsequent to the reinstatement of the Texas procedure in enforcing United States Attorney General Ramsey Clark stated in 1968:

> A small and capricious selection of offenders have been put to death. Most persons convicted of the same crimes have been imprisoned. Experienced students from many parts of the country [illegible] agree that there is no rational basis for distinguishing the few who have been executed from the many who have not. [illegible] Statement Before the Subcommittee on Criminal Laws and Procedures of the Senate Judiciary Committee on S. 1760 To Abolish the Death Penalty, July 2, 1968, Department of Justice Release, p. 2.

[illegible] Issues Twenty Unusual Years in Jury Service, 32 U. Det. L. J. 88 (1954); Mayers & Yarbrough, Bail and Jury Decisions, 54 Mich. L. Rev. 1 (1955); Comment, Women and Jury Service, 24 Wash. & Lee L. Rev. 274 (1967).

We espouse the fundamental view that when the State would impose either a punishment as severe and final as death itself or some lesser and more humane punishment, and the outcome—death or life—can turn on considerations which may be irrational and irrelevant, the defendant is subjected to cruel and unusual punishment by the very decisional process to which he is subjected. The very mark of cruel and despotic justice is that the despot need give no reason for the punishment he can decree.

Given the lack of any enunciated standards in the Arkansas statute, subjecting the rape defendant to the arbitrary power of the jury is tantamount to spinning a lottery system to determine punishment. In other words, the State of Arkansas here is seeking to exact a punishment which includes relegating the lawbreaker to the potentially capricious action of [illegible]

[illegible] submits that this irrational procedure far [illegible] comporting with the evolving standards of decency that mark the progress of a maturing society [illegible], makes a mockery of any enunciated concept of the dignity of man." *Id.* at 100.

The unfettered power of the jury results in a second type of cruel and unusual punishment in the process of the trial itself. Because the defendant cannot know what factors the jurors will apply the trial becomes a deadly game. Even under Arkansas' single verdict procedure, the defendant must choose whether to offer any mitigating circumstances. Petitioner has argued successfully that this is an unconstitutional choice. But our point here is that the single verdict procedure adds

immeasurably to the burden which defendant faces. What evidence should the defendant produce? Should he try to prove that he, personally, is unlikely to commit the same offense again? Should he try to show that others, who may not be able to control their impulses, will not be deterred by his death? Should he testify on his own behalf? Defendant is in short denied the ability to prepare an effective defense, and is instead relegated to making an irrational choice on a matter that may cost him his life.

Amicus respectfully submits that a situation which would make a game with no rules for the gamed of a man's life or life is degrading. It is itself cruel and unusual punishment which may not constitutionally be imposed.

Finally, lack of any standards must inevitably result in the occasional imposition of the death penalty in cases which do not warrant the extreme sanction. We will argue *infra* that the death penalty for any rape constitutes cruel and unusual punishment. However, regardless of whether the Court accepts the validity of that argument, we maintain that in some rape cases all fair minded people would agree that the death penalty could not be justified. Indeed, the Arkansas Legislature recognizes that death is an excessive penalty for some rapes, or it would not leave the choice to the jury.

There is yet another facet to the Arkansas system of committing the all important issue of life or death to

a jury which has no standard by which its decision is to be guided; it necessarily precludes an appellate court from passing on whether a permissible or impermissible conclusion was reached. The denial of effective judicial review is not only a deprivation of due process; it is equally a cruel and unusual punishment when the defendant is effectively deprived of the benefit of an independent review by the judiciary on the vital question of whether he must die and whether the jury acted capriciously in handing him over to the public executioner.

Justice Tobriner, joined by Chief Justice Traynor and Justice Peters, while addressing himself to Fourteenth Amendment consideration, used language equally germane to the Eighth Amendment; he said in the dissenting opinion in *In re Anderson*, 69 Cal. 2d 613, 633 (1968), 447 P. 2d 117, 154 (1968):

> Neither society nor the Legislature nor the courts have said why one capital defendant should be selected to die and another to live. The death penalty has been supported as a punishment, a deterrent, a satisfaction for revenge, an economy for the state, and on other grounds, each of which has been so little defended as it has been severely attacked. But no one knows which of these reasons and as many others as the mind can conceive are accidentally seized upon by judge or jury to grant or deny life. No one knows what causes judge or jury to select a capital defendant for death. We know only that the motives and motions that lead one death are as secret, disordered and

irrational as the statistical incidence of the death penalty itself. (Sellin, Capital Punishment (1967) 202; Kalven & Zeisel, The American Jury (1966) 436-444.) Yet the foundation rock of the law is reason; the judicial process presupposes 'that its determinations are justified only when explained or explainable in reason.' (Breitel, *The Law Makers* (1965) 65 Columb. L. Rev. 749, 772.)

"The irrational process of decreeing death cannot be reconciled with a sense of reasoned justice; we cannot explain why or when we impose the penalty. If a civilized society cannot say why one man should be executed and another not, it does not rationally, logically, take life. Instead, it grossly denies due process of law in inflicting death upon the basis of a trial that is capricious, discriminatory, and guess infested."

We cannot know whether petitioner, aged 21 at the time of his assault upon the prosecutrix without a weapon, would have been able to present enough mitigating factors to render a death sentence cruelly excessive. We do know that under Arkansas procedure, he did not have a meaningful opportunity to introduce such factors. In all events, the imposition of the death penalty, without an adequate and rational inquiry into the circumstances that would render such a penalty excessively cruel, itself offends the constitutional proscription against cruel and unusual punishment.[8]

[8] Our argument that the alternative choice of life imprisonment or death is a matter of grace and therefore not subject to constitutional attack unless the death penalty itself is unconstitutional is without merit. The states' processes, even in matters of grace, must conform to the Constitution. *See Brady v. Maryland*, 373 U.S. 83 (1963); *United States v. Jackson*, 390 U.S. 570, 582-583 (1968).

II.

Imposition of the Death Penalty for the Crime of Rape Constitutes Cruel and Unusual Punishment.

A major focus of the Eighth Amendment has been upon punishments which are cruelly excessive in relation to the crime committed. Thus, in *Weems v. United States*, 217 U.S. 349 (1910) this Court interpreted a portion of the Philippine Bill of Rights which was construed to be identical to the cruel and unusual punishments clause of the Eight Amendment to invalidate a sentence of fifteen years of "hard and painful labor," and other punishments, for the crime of falsifying an official document. The Court said there is "a precept of justice that punishment for crime shall be graduated and proportioned to offense." *Id.* at 367. Almost two decades earlier, in *O'Neil v. Vermont*, 144 U.S. 323 (1892), in which the majority failed to decide whether a prison sentence of over fifty four years for making 307 illegal sales of liquor was cruel and unusual, Mr. Justice Field had anticipated *Weems* in his dissent. He stated that "the whole inhibition [of the Eighth Amendment] is against that which is excessive." *Id.* at 340.

In *Robinson v. California*, 370 U.S. 660 (1962), the Court held that any punishment imposed upon a defendant solely for the status of being a narcotics addict was cruel and unusual. Mr. Justice Douglas, in a concurring opinion, pointed out that "a punishment out of all proportion to the offense may bring it within the ban against 'cruel and unusual punishments.'" *Id.* at 676.

Finally, in dissenting from the denial of certiorari in *Rudolph v. Alabama*, 375 U.S. 889, 889-91 (1963), Justice Goldberg asked on behalf of himself, Justice Douglas and Justice Brennan:

> "(1) In light of the trend both in this country and throughout the world against punishing rape by death, does the imposition of the death penalty by those States which retain it for rape violate 'evolving standards of decency that mark the progress of [our] maturing society,' or 'standards of decency more or less universally accepted'?
>
> "(2) Is the taking of human life to protect a value other than human life consistent with the constitutional proscription against punishments which by their excessive severity are greatly disproportioned to the offenses charged?"

The present case raises the questions asked by Justice Goldberg in 1963. *Amicus* contends that under the evolving standards of decency test enunciated in *Furman* and ratified in *Gregg v. Georgia*, 428 U.S. at 173 (1976), imposition of the death penalty for the crime of rape constitutes cruelly excessive punishment.

There can be no doubt that there is a prevailing worldwide view that death as a punishment for rape violates "standards of decency more or less universally accepted." The United States is one of only four countries in the world of the reporting which permit infliction of the death penalty for the crime of rape. The others are Nationalist China, Zambia and the Republic of South Africa. See *Rudolph v. Alabama*, *supra*, 375 U.S. at 891 n.1.[9]

[9] Since 1963, Nevada and North Rhodesia have been merged to form Zambia.

The rejection of the death penalty for rape by an overwhelming majority of the community of nations is highly significant. This is the only major English-speaking country in the world (except for South Africa) in which the death penalty for rape exists. Here, only 17 states retain the penalty. *Ibid.* In 1967 there were 18,000 actual rapes in the country, 5,200 in the death penalty states; in cities having a population of 60,583,000 there were 1,013 convictions for the crime. United States Department of Justice, Federal Bureau of Investigation, Uniform Crime Reports—1967 (1968) 11, 13, 100. Yet, in the same year, only 3 states sentenced 7 men to death for rape; the last execution for rape took place in 1964. United States Department of Justice, Bureau of Prisons, National Prisoner Statistics, No. 42, *Executions 1930-1967* (1968), 13, 22-23.

William Maxwell, who was 21 years old at the time of his offense, has been convicted of a crime which resulted from his inability to control his sexual instincts. He did not, either with premeditation or in the heat of passion, seek to take the life of another human being. He did not even carry a deadly weapon which might have endangered such a life. Yet Arkansas demands that he suffer the torture of a death sentence and ultimately be put to death for the crime of rape.

We would not be understood as minimizing the evil of rape involved where forcible rape is committed. Nor, that would we minimize other offenses violating the right of each member of society to be secure in his person. Our point is simply that the State is never justified in inflicting the disproportionate punishment of death as a penalty for rape, even if the Court rejects our other argument, *infra*, that the State is never justified in

extinguishing life as a punishment. In our constitutional scheme, the excesses of a state can no more be tolerated than the excesses of an individual.

III

Under the "Evolving Standards of Decency" Test Enunciated by This Court in Weems and Ratified in Trop, Infliction of the Death Penalty Constitutes a Cruel and Unusual Punishment.

During the congressional debates on the Bill of Rights, Mr. Livermore in questioning enactment of the Amendment is reported to have expressed his fears that

> "No cruel and unusual punishment is to be inflicted; it is sometimes necessary to hang a man, villains often deserve whipping, and perhaps having their ears cut off; but are we, in future, to be prevented from inflicting these punishments because they are cruel?" Quoted in Furman v. Georgia, 33[1] U.S. 240, 261 (1972).

Early cases utilized the Eighth Amendment to preclude ancient modes of punishments such as burning at the stake, crucifixion, breaking on the wheel and similar punishments which involved "torture or a lingering death." In re Kemmler, 136 U.S. 436, 447 (1890) or which constituted "unnecessary cruelty." Wilkerson v. Utah, 99 U.S. 130, 136 (1878).

However, in the Weems case, the Court rejected the notion that the Eighth Amendment applied only to various ancient forms of punishment. The Court in discussing the evolutionary nature of the Eighth Amendment declared:

> "Time works changes, brings into existence new conditions and purposes. Therefore a principle to

be vital must be capable of wider application than the mischief which gave it birth . . . . Under any other rule a constitution would indeed be as easy of application as it would be deficient in efficiency and power. Its general principles would have little value and be converted by precedence into impotent and lifeless formulas. Rights declared in words might be lost in reality." 217 U.S. at 373.

Following this concept, the Court has expanded the types of punishment that are considered inherently cruel under the Eighth Amendment. *See e.g. Trop v. Dulles*, 356 U.S. 86 (1958), in which the Court held that loss of citizenship was a cruel and unusual punishment. Basing on *Weems, supra*, the Court concluded that the Eighth Amendment "must draw its meaning from evolving standards of decency that mark the progress of a maturing society." 356 U.S. at 101.

In applying the evolving standards of decency test to capital punishment, it is necessary to give some consideration to the penalty with which we are concerned. It is unfortunate that the abstraction "capital punishment" tends to obscure the reality of an execution. Unhappily, the detailed description of a legal lynch of the

"The Court has expressed doubt that there is any meaningful distinction between what is 'cruel' and what is 'unusual' in the application of the Eighth Amendment. *Trop v. Dulles*, *supra* at 99 [1]. As the Court stated in these earlier cases, indeed the clause simply examines the particular punishment involved in light of the basic prohibition against inhuman treatment without regard to any subsidiary standards that might be lurking in the word 'unusual.' *Ibid.* However, even if the term 'unusual' is deemed to have independent significance, a very marked majority of Americans remain unconvinced of the death penalty's unacceptability as a matter of present practice, particularly for any crime that society wished. This unwillingness to hold evidence that our maturing society considers the penalty cruel is no short of controlling."

realities which attend the extinction of life by the State even by so-called "humane" methods would appear to substitute sensationalism for legal advocacy. Nevertheless, in assessing the cruelty of the death penalty, the Court must be aware of the nature of an execution; accordingly, that portion of Warden Duffy's testimony before Senator Hart's subcommittee which describes an execution has been set forth in the appendix to this brief at pages 2-5.

But the execution itself—terrible spectacle though it is—constitutes only a portion of the total punishment. The psychological and mental torture inflicted upon the prisoner awaiting death, and the preparation of the individual for the ritual extinction, comprise distinct portions of the total punishment. The mental health of the condemned men deteriorates, and the suicide rates on Death Rows are the highest in prisons. See generally Gerald H. Gottlieb, *The Capital Punishment Context* (Center for the Study of Democratic Institutions 1966) (reprinted in 9 Crime & Delinquency (No. 1), 3 (July–Aug. 1963)).

Warden Duffy has written elsewhere:

> "Death row at San Quentin is a nine-headed monster for the men there have nothing to live for but the gas chamber and little to do but think about it. In the hotbed of hopelessness and dejection, irritations become monstrous in misery, usually it produces hatred, bitterness, hopelessness and despair. There is no more depressing spot on the face of the earth than the narrow corridors of the sixth floor of the south cell block at San Quentin." Duffy, Hirshberg, 88 Men and Two Women 196-200 (1962). As Camus remarks: "The devastating degrading fear that is imposed on the condemned man for months or the year is a punish-

ment more terrible than death, and one that was not imposed on the victim." Camus, *Reflections on the Guillotine*, in Resistance, Rebellion and Death, 200 (1961).

A hallmark of our constitutional system is the principle that, to justify intringing upon human rights, the state must demonstrate a compelling interest which is sufficient to outweigh the challenged intringement and which cannot be protected by less severe means. See, e.g., *Aptheker v. Secretary of State*, 378 U.S. 500, 508 (1964); *Sherbert v. Verner*, 374 U.S. 398, 406-409 (1963); *Bates v. Little Rock*, 361 U.S. 516, 524 (1960); *Shelton v. Randall*, 357 U.S. 513, 523-530 (1958).

This principle is applicable in testing a penalty under the cruel and unusual punishments clause of the Eighth Amendment. If the penalty does not serve any permissible aim of punishment or if there are less drastic alternatives which will serve the same purpose, then the penalty constitutes cruel and unusual punishment.

Thus in *Weems v. United States*, 217 U.S. 349, 381 (1909), the Court discussed the concept of relative cruelty based on necessity. The opinion of the Court emphasized the importance of the goals of the punishment in discussing permissible punishment under the Eighth Amendment. In rejecting the unnecessary cruelty of "hard and painful labor" as compared to less cruel punishment the Court stated:

> "The State thereby assumes nothing and loses nothing in power. The purpose of punishment is fulfilled. Crime is repressed by penalties of just severity, deterring others from crime, reformation is prevented, and hope is given for reformation of the criminal."

Similarly, in his concurring opinion in *Trop v. Dulles*, 356 U.S. 86, 111 (1958), Mr. Justice Brennan stated,

> "In view of the manifest severity of this sanction, I feel that we should look closely at its probable effect to determine whether Congress' imposition of expatriation as a penal device is justified in reason."

Mr. Justice Brennan specifically addressed himself to the question of whether there is any relationship of the punishment to the legitimate ends of penal law, *Id.* at 111, and whether the end can be achieved by "alternative methods" not open to the objections to the penalty questioned. *Id.* at 114.

And in *Robinson v. California*, 370 U.S. 660, 677 (1962), Mr. Justice Douglas stated with reference to the Cruel and Unusual Punishments clause, ". . . I think the means must stand constitutional scrutiny, as well as the ends to be achieved."

Surely, before the State may impose the ultimate sanction of extinguishing the most fundamental human right—the right to live—it must demonstrate a permissible justification and a lack of less severe alternatives. *Cf., United States v. Jackson*, 390 U.S. 570, 582-583 (1968).

The permissible aims of punishment are recognized as including deterrence, isolation and rehabilitation. *Williams v. New York*, 337 U.S. 241, 248 (1949); *Trop v. Dulles*, 356 U.S. 86, 111 (1958) (concurring opinion); *Rudolph v. Alabama*, 375 U.S. 889, 891 (1963) (dissenting opinion to denial of writ of certiorari); *Morisette v. United States*, 342 U.S. 246, 251 (1952).

This Court has noted in *Williams v. New York, supra,* at 248, that "Retribution is no longer the dominant objective of the criminal law." As the New York Court of Appeals stated, "there is no place in the scheme for punishment for its own sake, the product simply of vengeance or retribution." *People v. Oliver,* 1 N.Y. 2d 152, 160, 134 N.E. 2d 197, 202 (1956) quoted in *In re Estrada,* 63 Cal. 2d 740, 745 (1965).

In Eighth Amendment terms, penalties which have improper or solely retributive objectives run afoul of the warnings contained in virtually all of the cruel and unusual punishment cases against "unnecessary cruelty." *See e.g., Wilkerson v. Utah,* 99 U.S. 130, 136 (1878); *Louisiana ex rel. Francis v. Resweber,* 329 U.S. 459, 463 (1947).

What, then, is Arkansas' *raison d'etre* for the death penalty? Obviously it can have no rehabilitative effect. Equally obvious is the fact that isolation can be achieved through means other than death. Thus, the state can seek to justify the death penalty only in terms of deterrence.

There is, however, no credible evidence—despite exhaustive inquiries into the subject—that the death penalty is a deterrent superior to lesser punishments. *See, e.g.,* Sellin, Capital Punishment 135-186, 244-253 (1967).

"It is generally agreed between the retentionists and abolitionists, whatever their opinions about the value of comparative studies of deterrence, that the data which now exist show no correlation between the existence of capital punishment and lower rates of capital crime." United Nations, Department of Economic and Social

Affairs, *Capital Punishment* (ST/SOA/SD/9-10) (1968) 123; *Accord,* Presidents' Commission on Law Enforcement and Administration of Justice, Crime in a Free Society 143 (1967).[6]

Arkansas has not met and cannot meet its burden of demonstrating the efficacy of the death penalty as a deterrent.

Indeed, it is significant that under Arkansas law the jury is given the alternative of selecting a sentence of life imprisonment or death upon finding a defendant guilty of rape. The legislature has refrained from providing any standards indicating that one penalty is preferred to the other in any given situation. Thus, the Arkansas legislature has itself determined that an alternative to the death sentence adequately serves the goal of deterrence. The choice it has left to the jury must be characterized as an impermissible choice between raw vengeance and the legitimate aims of the criminal law. As Professor Sellin has written:

> ". . . the struggle about this punishment has been one between ancient and deeply rooted beliefs in retribution, atonement or vengeance on the one hand, and, on the other, beliefs in the personal value and dignity of the common man that were born of the democratic movement of the eighteenth century, as well as beliefs in the scientific approach to an understanding of the motive forces of human

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[6]Justice Goldberg, in *Rudolph v. Alabama, supra,* at 890 n. 6, alluded to United Nations statistics showing no increase in rapes in Canada after rape ceased to be punishable by death, although he noted that such statistics must "be regarded with caution." United Nations, Capital Punishment (study prepared by Marc Ancel, Justice of the French Supreme Court, New York 1962). This international study showed an absence of any statistical correlation between deterrence and the death penalty.

conduct, which are the result of the growth of the sciences of behavior during the nineteenth and twentieth centuries." Sellin, The Death Penalty (1959), published as an appendix to American Law Institute, Model Penal Code, Tent. Draft. No. 9 (May 8, 1959) 15.

Unless we are to conclude that our standards of decency, rather than maturing, have taken an atavistic turn toward a more primitive form of civilization, the death penalty must be seen as a form of punishment which cannot be justified as serving any legitimate purpose of penology; even the state which imposes it considers it unnecessary to do so. The state has not and cannot demonstrate a compelling and legitimate interest in the imposition of this extreme penalty. This being so, the imposition of the death penalty constitutes "unnecessary cruelty," and is therefore unconstitutional. *Weems v. United States*, 217 U.S. 349, 370 (1910).

Amicus believes that imposition of the death penalty without a showing by the state that it, more than life imprisonment, acts as a superior mode of deterence, constitutes a palpable violation of our maturing standards of decency, which, as this Court recognized in *Williams v. New York, supra*, do not encompass vengeance or retribution. However, lest it be adduced either that our standards of decency have regressed, or that the state need not show a deterrent effect to justify the taking of a man's life, *Amicus* will argue that independent evidence repudiates any notion that the death penalty comports with this society's concept of the dignity of man. First, the *de facto* near abolition of the death penalty shows that it is no longer widely

accepted; second, the secrecy of our few executions demonstrates our shame at what we do when we do it.

In 1958 this Court, while it did not focus upon the constitutionality of the death penalty for the crime of rape, or even upon the death penalty in general, apparently believed that the death penalty was still so widely accepted as not to be considered cruel and unusual. See *Trop v. Dulles,* 356 U.S. 86, 99 (1958).

The eleven years which have passed since 1958 have witnessed a sharp acceleration in the worldwide trend toward *de facto* abolition of the death penalty, and a particularly precipitous decline in its imposition in the United States, so that the death penalty simply is no longer "widely accepted." Indeed, it has largely been repudiated, particularly for crimes other than murder. All informed observers of the death penalty agree in describing a worldwide trend toward its disuse that is nothing short of dramatic. See United Nations, *Capital Punishment*, 81-82, 96-97; Sellin, The Death Penalty, (1959) 4-14; Mattick, The Unexamined Death (1966) 5-6; Hartung, *Trends in the Use of Capital Punishment,* 284 Annals 8 (1952); Sellin, *The Inevitable End of Capital Punishment;* in Capital Punishment (1967) 239-240; Bedau, *Death Sentences in New Jersey 1907-1960,* 19 Rutgers L. Rev. 1, 9-11 (1964).

The National Crime Commission recently noted that with respect to the United States:

> "The most salient characteristic of capital punishment is that it is infrequently applied . . . [A]ll available data indicate that judges, juries and governors are becoming increasingly reluctant to impose or authorize the carrying out of a death sen-

tence." President's Commission on Law Enforcement and Administration of Justice, Report (*The Challenge of Crime in a Free Society*) (1967) 143.

The accuracy of the Commission's report is confirmed by the Federal Bureau of Prisons. Its latest cumulative report shows that 3,859 persons were executed under civil authority in the United States between 1930 and 1967. United States Department of Justice, Bureau of Prisons, National Prisoner Statistics, No. 42, *Executions 1930-1967* (June 1968) 1. Of these 3,859, only 191 were executed between 1960 and 1967; only 25 during the years 1964-1967. *Ibid.* The trend is shown quite adequately by setting out the figures for the number of executions during each of the following representative years:

TOTAL NUMBER OF EXECUTIONS
IN THE UNITED STATES

1930—155
1935—199
1940—124
1945—117
1950—82
1955—76
1960—56
1961—42
1962—47
1963—21
1964—15
1965—7
1966—1
1967—2

In 1968, of course, there were no executions in this country. *Id.*, at 7.

In 1968, this Court took judicial notice of the fact that a majority of Americans oppose the death penalty. *Witherspoon v. Illinois,* 391 U.S. 510, 520 (1968).

Perhaps more significant than the Gallup poll noted by the Court in *Witherspoon* was the number of eminent criminologists, penologists, and law enforcement officials who testified against the death penalty before the subcommittee of the Senate Judiciary Committee on S. 1760 *To Abolish the Death Penalty.* These included the then Attorney General of the United States Ramsey Clark, former director of Federal Prisons James V. Bennett, former Governor DiSalle of Ohio and Warren Duffy.[7]

As the President's Commission noted, we as a society are relectant to execute our criminals, and so we have drastically cut down on the number of our executions. However, we remain mortally ashamed of even our few executions. Lip service to the idea of deterrence notwithstanding, the dehumanizing influence of the spectacle of ritual execution of the condemned man has led the state to hide its cremony behind closed doors through which the public is not even admitted. The late Justice Bok of the Pennsylvania Supreme Court asked: "Why is the State so ashamed of its process that it must kill at the dead of night, in an isolated place, and on an unnamed day?" Bok, Star

[7]In September of this year, the ranks of the professionals opposed to the death penalty were augmented when the Conference of Delegates of the State Bar of California went on record as opposed to the death penalty. *Los Angeles Times,* September 9, 1969, p. 1.

Wormwood 197 (1959). The secrecy which attends the ceremony of death is an indicia that our evolving standards of decency have matured to the point where we cannot bear to see men executed. Indeed, *Amicus* would argue that the only factors which have saved the death penalty from complete extinction are the rarity and secrecy of executions. But capital punishment is not made less cruel by the fact that it is applied behind closed doors to a small and unfortunate minority. Our concept of the dignity of man tolerates in practice neither numerous nor public executions. The Court must not tolerate as a matter of law isolated and secret executions.

One further argument remains to be discussed. Despite the worldwide trend toward abolition of the death penalty, partiticularly for crimes other than murder, how can this Court decide that our evolving standards of decency are offended by the death penalty when a majority of state legislators normally thought to be the repository of public opinion have apparently reached the opposite conclusion? This would appear a frivolous argument on behalf of the State since a traditional role of this Court has been to pass upon the fundamental standards on which this society is based. *Amicus* would not mention this argument at all were it not for the existence of several State cases which have upheld the constitutionality of capital punishment on its account.

Connecticut v. Davis, ... Conn. ..... (May Term 1969), involved imposition of the death penalty for multiple murders, rather than for a rape unaccompanied by the use of a dangerous weapon, but the Connecticut court's failure to come to grips with the Eighth Amendment is illustrative of the problem. In rejecting the de-

fendant's argument that the punishment of murder with execution violated the Eighth Amendment, the state court felt impelled to observe:

> "To adopt the argument of defendant would require this court to vitiate what is inherently a legislative determination that the death penalty is an appropriate mode of punishment for the crimes enumerated [citing statutes]."

There are two answers to the Connecticut Court. First, the ineritia of some state legislatures, and their failure to alter what once may have been, but no longer is, a decent standard of inflicting punishment, does not necessarily reflect the current standards of decency of this society. Second, the Eighth Amendment places constitutional restrictions upon those who enact penalties, as well as upon those who carry them out. The Amendment is directed at both judge and legislator. Accordingly, the evolving standards of decency test is not whether the legislators of some states will suffer the continuance on their statute books of an archaic and rarely imposed penalty; rather the test must be whether our concepts of the dignity of man would allow the even-handed application of the death penalty to the thousands of men who, like William Maxwell, have been convicted of a capital offense. This test is critical to the function of the Eighth Amendment. The *amici* brief filed by the N.A.A.C.P. Legal Defense and Educational Fund, Inc., and the National office for the Rights of the Indigent in *Boykin v. Alabama*, 395 U.S. 238 (1968), at page 40, presents this issue succinctly:

> "The real danger concerning cruel and inhuman laws is that they will be enacted in a form such that they can be applied sparsely and spottily to

unhappy minorities, whose numbers are so few, whose plight so invisible, and whose person so unpopular, that society can readily bear to see them suffer torments which would not for a moment be accepted as penalties of general application to the populace.

"Herein is found the difference between the judgment which the legislator makes, responding *politically* to public conscience, and the judgment which a court must make under the obligation which the Eighth Amendment imposes upon it to respond *rationally* to public conscience. A legislator may not scruple to put a law on the books whose general, even-handed, nonarbitrary application the public would abhor—precisely because both he and the public know that it will not be enforced generally, even-handedly, nonarbitrarily. But a court cannot sustain such a law under the Eighth Amendment. It cannot do so because both the Amendment itself and our most fundamental principles of due process and equal protection forbid American governments the device of arbitrariness and irregularity—even as a sop to public conscience."

This Court has traditionally been willing to hold statutes unconstitutional when they have violated the requirements of due process. *Amicus* submits that the constitutional mandate to the Court with regard to cruel and unusual punishment was framed by the Founders in even more direct and more specific terms than was the due process clause. Our evolving standards of decency do not tolerate widespread, even-handed execution of any class of convicted criminals. This Court

should not permit the State of Arkansas to single out William Maxwell from among the thousands of men who have committed capital offenses as serious as, or more serious than, the crime of rape and to impose upon him the ultimate penalty of death.

Conclusion.

For each of the reasons discussed above, the death sentence imposed upon petitioner by the State of Arkansas violates the Eighth Amendment as applied to the states by the Fourteenth Amendment. The sentence should be invalidated by this Court.

Respectfully submitted,

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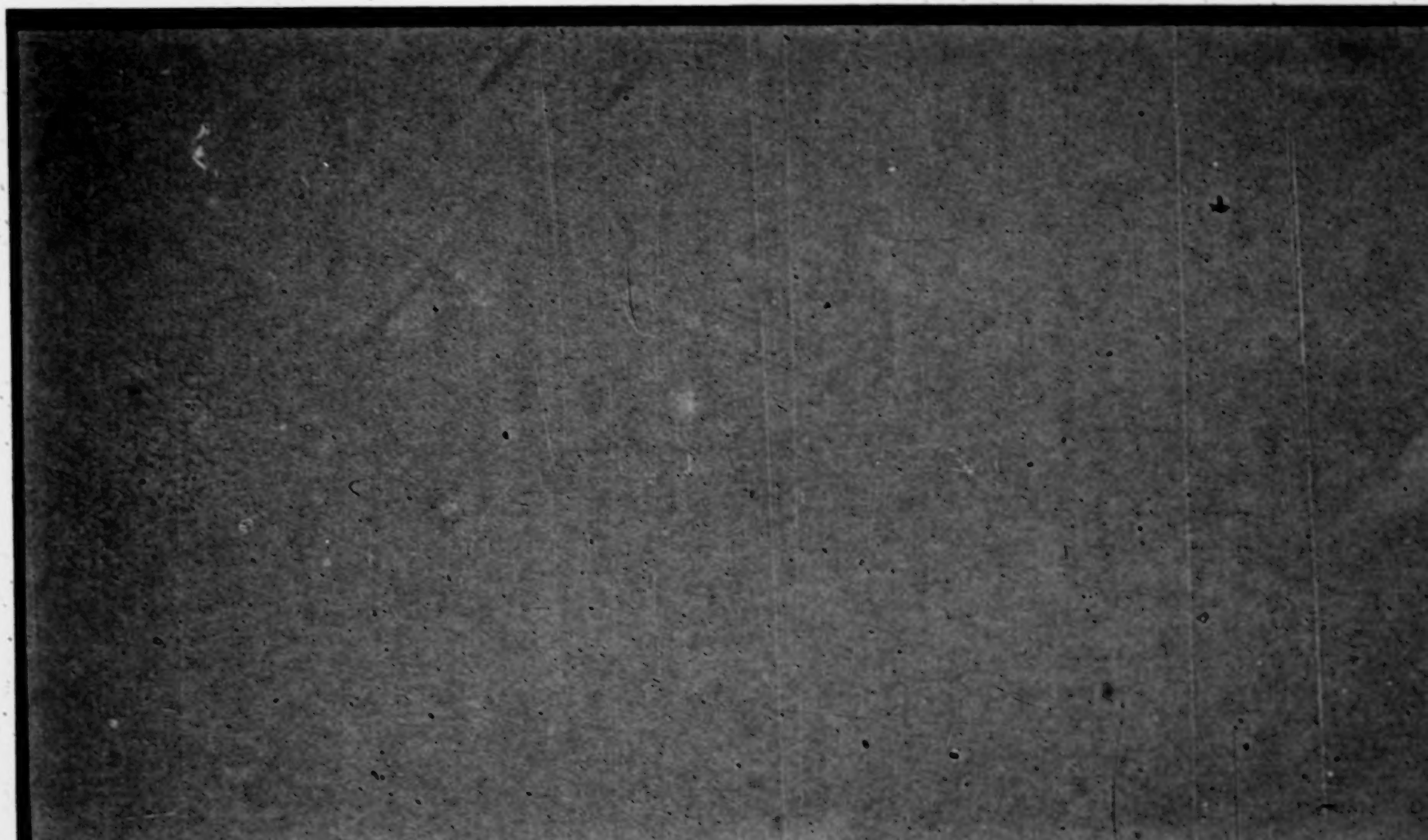

APPENDIX.

Statement of Clinton Duffy, Former Warden of San Quentin, March 20, 1968, Before the Subcommittee on Criminal Laws and Procedure of the Judiciary Committee of the United States Senate, Hearings on S. 1760, To Abolish the Death Penalty..

Mr. Duffy. Thank you very much, Senator Hart, and members of your committee.

As you said, Senator, I was born and raised in the prison town of San Quentin and I spent all but a very few of my adult years in working in prison work and my presentation therefore is going to be on my practical experiences that I have had for over 32 years in handling adult offenders, both male and female, those who have been condemned to death.

I have personally witnessed over 150 executions and have personally officiated at the execution of 88 men and two women. Prior to my appointment as Warden of San Quentin, I participated in 60 legal hangings. The two women were the first women executed in the history of the State of California.

May I preface my presentation with a brief account of methods of executions in the U.S. I would like to just say a word here about how executions became a part of the prison system in California. Prior to that time the sheriff of the county was required to perform the execution in his county, in his courtyard or in his court buildings. Some sheriffs did not like that idea, and so one of them recommended and suggested to his legislator that they change it from the county to the state prison, then only San Quentin in Cali-

fornia. This was done, passed by legislation, and San Quentin became the place for legal executions. That sheriff was against it, as you can understand.

When it became a law, the same sheriff was appointed Warden of San Quentin, and had to execute anyhow, and was still against legal executions, he, a peace officer.

Hangings were the No. 1 in our State in California, and I think they were prevalent throughout the United States. Hanging, whether the prisoner is dropped through a trap, after climbing the traditional 13 steps, or whether he is jerked from the floor after having been strapped, black-capped and noosed, is a very gruesome method of execution which has been used for many years, and is still used in several states.

When, on a nod from the Warden, the executioner signals the three men in the small enclosure on the gallows, and the officials cut taut strings one of these strings springs the trap while the other two are attached to dummy ropes. This gives the three officers a "somewhat" clear conscience, projecting the actual springing of the trap on the other person.

The day before an execution the prisoner goes through a harrowing experience of being weighed, measured for length of drop to assure breaking of the neck, the size of the neck, body measurements, et cetera. When the trap springs he dangles at the end of the rope. There are times when the neck has not been broken and the prisoner strangles to death. His eyes pop almost out of his head, his tongue swells and protrudes from his mouth, his neck may be broken, and the rope many times takes large portions of skin and flesh from

the side of the face that the noose is on. He urinates, he defecates, and droppings fall to the floor while witnesses look on, and at almost all executions one or more faint or have to be helped out of the witness room. The prisoner remains dangling from the end of the rope for from 8 to 14 minutes before the doctor, who has climbed up a small ladder and listens to his heart beat with a stethoscope, pronounces him dead. A prison guard stands at the feet of the hanged person and holds the body steady, because during the first few moments there is usually considerable struggling in an effort to breathe.

The legal witnesses are dismissed after having signed the usual witness forms. However, the body of the condemned, is left hanging below the gallows for an additional 15 or 20 minutes. This is to assure those in charge that ample time has elapsed before cutting the rope in order to make certain of death.

The body is then placed in a prison-made casket and kept in the morgue until loved ones or friends claim the remains, or in some cases they are buried in what the inmates call Boot Hill, the inmates' cemetery on the reservation. Most bodies are claimed by relatives, loved ones or friends, and funeral services are conducted in many cases in chapels in their own home town. Or a member of the clergy arranges burial in a cemetery away from the prison.

Although I have seen several electric chairs, I have never witnessed an electrocution. Wardens and other noted penologists have told me that it is about as gruesome a procedure as hanging. The body has to be prepared beforehand for the fastening, and one of the pants legs split in order that an electric plate can be placed

against the leg. When the executioner throws the switch that sends the electric current through the body, the prisoner cringes from torture, his flesh swells and his skin stretches to a point of breaking. He defecates, he urinates, his tongue swells and his eyes pop out. In some cases I have been told the eyeballs rest on the cheeks of the condemned. His flesh is burned and smells of cooked meat. When the autopsy is performed the liver is so hot that doctors have said that it cannot be touched by the human hand. As in hanging, electrocution disfigures the body severely.

Prison morale is disrupted by the dimming of the lights throughout the institution when the switch is thrown the several times necessary to insure death.

In facing a firing squad several rifle shots are fired, and all but one are effective. As in the case of hanging and electrocution, shooting disfigures the body severely.

Here again a little sidelight information. I was told by a warden recently that some years past at an execution by way of the firing squad, the sheriffs were required to bring their squad from the county of conviction to the penitentiary and perform the execution. They came, The prisoner was placed against the wall in the yard, and I imagine a target placed over his heart area, and when the sheriff gave the word to fire, they missed. They hit him in the shoulder and the prisoner went to the ground screaming in horror and in pain. They had forgot to bring additional ammunition when they were told to reload and fire again. That took about 20 minutes to go get more. They missed the second time. And so the sheriff went up and shot the prisoner in the head, walked out of the penitentiary, and resigned. This I received from a warden of one of the penitentiaries nearby that knew this to be a fact.

In administering death by lethal gas, which has been most of my experience, and hanging, from 89 personal experiences, I made the following observations:

With the exception of the death watch (which is used in all methods) there are no last hours of preparation of the body of the condemned. The prisoner is kept in a holding cell in a separate room for his last few days—usually not more than 20 feet from the lethal gas chamber. He does not see the gas chamber until he enters it. A few moments before the scheduled hour a chaplain of his choice visits with him. He is dressed in blue jeans and a white shirt. The reason for that is no other garments that might hold or pocket gas when the body is removed. He is accompanied the 10 or 12 steps by two officers, quickly strapped in the metal chair, the stethoscope applied, and the door sealed. The warden gives the executioner the signal and, out of sight of the witnesses, the executioner presses the lever that allows the cyanide gas eggs to mix with the distilled water and sulphuric acid. In a matter of seconds the prisoner is unconscious. At first there is extreme evidence of horror, pain, strangling. The eyes pop, they turn purple, they drool. It is a horrible sight. Witnesses faint. It finally is as though he has gone to sleep. The body, however, is not disfigured or mutilated in any way.

It could be said and it has been said that lethal gas executions are more humane. In all methods the person is, of course, dead. In my way of seeing it, there are no humane ways to kill people. However, in lethal gas the last preparations are not so grim. Lethal gas executions are a bit less nerve wracking on the personnel than other methods, and the family of the con-

demned prisoner, his loved ones and the friends who claim the body do not go through as much of a harrowing experience when they claim a body that has not been mutilated. I have talked with many of these folks and, although they are griefstricken, it is not quite so hard on them emotionally, when the body is not disfigured.

Throughout all of my over 32 years of prison work, as a youngster growing up in a prison town, as a young man living within a few yards of the shadows of the prison walls, I have always been against capital punishment. I have been asked many times again by people, "When did you change your mind that you changed in favor of abolition of the death penalty and why did you change your mind?"

My answer has been one word, "Never." I have always believed that this is wrong.

Senator Hart. Warden, at that point let me ask you a question which in substance is one of the arguments that is given against the abolition. You have spent a lifetime around the prison, and all of your adult life inside a prison. Wasn't your lifesaver, weren't you more secure against being jumped because the prisoners with whom you worked knew that if they killed you, in an effort to escape, or out of frustration, that they themselves would be executed? Doesn't the existence of capital punishment deter at least inmates from abusing prison personnel?

Mr. Duffy. I don't think so, Your Honor, because I will give you an example. I could give several.

I left San Quentin to go on the Parole Board, known as the Outer Authority, December 27, 1951. The fol-

lowing December 1952, in the big yard at San Quentin, there was a murder. Between here where I am seated and the door is the entrance to condemned row and the gas chamber. That man did not think of the death penalty when he murdered another prisoner. Four or five days later a second man committed a murder in this very same spot, within just a few yards of the entrance to the gas chamber. Within four weeks four men had committed murders in that same yard, with the door to the gas chamber right over there.

Now, did the first man think of the gas chamber within 20 paces from where he committed the murder? Did the second man think of what the first man might be facing, and the third what the first and second, and the fourth what the first, second and third were facing? No. They thought only of their incident, and I don't believe that the death penalty in our penitentiaries deters men from committing a crime that they have in their minds.

Senator Hart. This is a very useful answer, because you know a whole lot more about the problem than the people who have made the argument.

Mr. Duffy. Thank you. To continue. I have always been against capital punishment. Prisoners have always been a part of my life. Murderers have worked in our home. And I might say here that we believe in prison work, and know in prison work that the murderer usually is the No. 1 best prisoner, and the murderer released on parole is the No. 1 best parole risk in your communities.

As children, criminals of all types have been assigned to our gardens, repair and maintenance of build-

ings and have attended to the needs around the grade school which I attended, as grade student.

I believe one of the reasons I have been against the death penalty all of my life is very, very simple. Wrong to kill.

It is wrong that these people in our penitentiaries have murdered. That they have committed a murder is 100 percent wrong. There is no valid reason for their act.

I believe it is also wrong that the State or Federal Government commit another premeditated murder. Two wrongs do not make a right.

Deterrent:

During my years at San Quentin I talked with every man (and two women) that I had to walk to the gas chamber, that were committed to San Quentin Prison under the penalty of death. Many of these have been executed, others commuted to life imprisonment, some without possibility of parole. A few have had new trials or reversals. Some have died while serving their sentence within the prison walls. I found that 80 lifers died in prison in the 10 years surveyed, meaning that all lifers are not released, all prisoners are not released. Some are required to stay in prison the rest of their natural life and to die in prison.

I have personally asked every man (and two women) if they gave any thought to the fact that they might be executed should they commit a murder or a crime that is covered by the death penalty. I have asked hundreds—yes, thousands of prisoners, who have committed homicides, and who were not sentenced to death, whether or not they thought of the death penalty be-

fore the commission of their act. Their answer is invariably that they did not expect to get caught. That it was a crime of passion, jealousy, rage, temporary insanity.

I have interviewed and have asked the same question of thousands of robbers or men of aggression who have used a gun or other deadly weapon in the commission of their crimes. They are, of course, potential murderers. They give similar answers.

I have, to date, not had one person say that they had ever thought of the death penalty prior to the commission of their act. I have had peace officers tell me that prisoners in jail have said that the only reason that they did not use a loaded gun or they used a cap pistol was that they thought of the death penalty, and when they come to our penitentiary, however, their trials are over, everything is resolved legally, and I believe that they give you a little bit more of the regular story than they do when they are in jail trying to curry a little bit of favor, and so I have not had one of them say that they thought of the death penalty or used a toy gun or an unloaded gun. Yes, they say, "I used an unloaded gun because I didn't want to hurt someone. All I wanted was their money, and I wanted to scare them; but I didn't think of the death penalty, and that is not why I did not use it."

I do not favor capital punishment because I do not believe it is a deterrent to crime. Statistics show that where it has been abolished, there is no noticeable difference in the number of homicides committed in like areas. In some states homicides are higher in capital punishment states than in their neighboring abolition state, I believe that executions promote more similar

crimes in the community. Many of us in prison work also know that there are more homicides following an execution than preceding same.

Why do I say I believe that executions promote more similar crimes in the community? Because we have them right after executions more than prior to that, and does it create in the minds of some of the weak people that are our citizens the idea to do something similar? I use the case of Carroll Chessman, which everyone knows, knowing that in California shortly following Carroll Chessman's execution, we had one and I believe two incidents similar to his red light bandit crimes that he was convicted of and eventually executed for. So this is the point you cannot prove. But you live with it, and it seems to be that you are promoting crime by having the death penalty.

No Equality.

There is no equality in conviction and sentencing of those who commit murder. I have often said, and I repeat here, that I can take you into San Quentin Prison or to Sing Sing, Leavenworth or Atlanta prisons and I can pick out many prisoners in each institution serving life sentences or less, and can prove that their crimes were just as atrocious, and sometimes much more so, than most of those men on the row. The verdict of death by lethal execution is, I believe, an emotional release by those who are hearing the case.

May I just give another example on deterrence. We had a deputy sheriff that used to bring prisoners to us at San Quentin regularly. I talked with him. I had lunch with him. We talked of many things. He booked in prisoners in the Los Angeles County for stealing

automobiles, bad checks, all the way up to sex offenses, murder, and those sentenced to death, and brought them to San Quentin on assignment by the sheriff.

He killed his wife. He came to condemned row. I asked him, "Al, how come you didn't think of the death penalty, you are a deputy sheriff? You should have known." And we went through quite a little talk about it. He said, "Look. I planned the murder of my wife. I did it wrong. It should not have been that way. I should have handled it in some other manner, but my only thought was to plan the murder of my wife and carry it out. I did not think of the death penalty for one second. I should have."

There is a man, a peace officer, who brought men to San Quentin, who brought condemned prisoners to the institution, did not think of it.

We had another man who helped install a lethal gas chamber at San Quentin, when it was changed from hanging to lethal gas. He was in on a lesser crime. He was assigned as a laborer to help the engineer and the people who brought the lethal gas chamber from the State of Colorado, where it was manufactured, for installation.

Every night when he would come into the big yard, he would be surrounded by prisoners and they would say to him, "Tell us about the lethal gas chamber. Tell us about the "horror chamber," as they called it. And he would give them a blow-by-blow description of the installation. Invariably he would say every night, "Fellows, this is as close as I want to get to the gas chamber." And so he went out eventually, served four or five years, and he was out maybe four or five years. He

became enamored with a half sister. People tried to break it up. He killed three people, two members of his family and another.

He came back on condemned row, I asked him the same questions and his answer was almost similar to the Deputy Sheriff. "When the devil gets into you, you think of nothing else but what you are going to do. I did not think of the gas chamber, although I helped install it."

And so it is not as far as I see it a deterrent. There are many, many other cases.

As far as equality is concerned, any prison warden will tell you, any peace officer will tell you that there is not an equal performance of the outcome of the cases that come before the courts and are sentenced to prison.

Governor DiSalle said something about the wealthy are never executed. I can give you a lifetime of experience that that is true. I have asked many hundreds and hundreds of people in public addresses that I have made, "Do you know of anyone that was wealthy that was ever sentenced to be executed in the history of the United States?" And after over 35 years of lecturing, I have yet to have one say that they could. And I also preface that by saying, "If you will give the name and the location, I will research it and use it in my lectures from here on." So I call it a privilege of the poor.

Have there been errors? Yes, there have. They are reported and there is always an element of the chance of error. It is true that the automatic appeal used in some states is a means of finding any errors. However, if an innocent person is put to death, as we know and in

later years the real murderer comes to light, it is too late to do anything about it. There have been many reversals by the State and Federal courts. Many new trials ordered, lesser degrees administered and Governors and Presidents have commuted many condemned inmates to a lesser degree than death.

I believe it is somewhat emotional on the part of the people who hold the belief that the death penalty should remain. People who come to our prison are, in most cases, emotionally or mentally disturbed. I have known cases where men have had to be executed when all they were able to answer were the legal answers to questions: "Know the difference between right and wrong, the seriousness and quality of their act, and the penalty they were facing." The old McNaughton rule. They would otherwise be so mentally gone that their case was pitiful. Some would have to be led to the gallows or the gas chamber; others dragged, while screaming from mental fear.

Innocent:

Although I have never personally known of an innocent person to have been executed, there is documented proof that this has happened a few times. It is, of course, too late to do anything about it after the trap has been sprung.

Victims:

Often we are confronted with the statement: "How about the victims?" "How about their loved ones?"

Yes, we do think of the victims and of their loved ones. I have counselled with families of the victims who have come to see me about information they might be able to get from the condemned. I have directed them,

consoled them, wept with them, and prayed with them. What has happened to their loved one is wrong. I repeat two wrongs do not make a right.

We also think of the loved one of the condemned. They too suffer greatly. They have not committed any crime, but their grief is heavy.

Costs:

It costs more to execute than to send a person to prison, to serve a full life sentence, and did in prison. This is proven by a survey made by a noted penologist in the State of Illinois. (See Renewal, February 1, 1963) in which he states in part, "I found that 30 years of imprisonment," and 30 years is an insurance company acturial type of measurement, "cost the State about $45,000, assuming no cost-offsetting activity on the part of the prisoner. By way of comparison, the costs of a capital trial and appeals, special security handling in court and jail, and the long stay on condemned row, the rehearsals, and carrying out of an execution, were in excess of $60,000. Capital punishment is by no means cheaper than life imprisonment, and the jurisdiction that maintains it pays for it dearly in both money and human costs."

California's Administrator of Youth and Adult Corrections Agency in an article in Federal Probation and Parole Magazine, June 1964, wrote: "There is also the argument of cost. Why support some murderer for the rest of his life when we could execute him, and save all that money, the argument goes.

"Like so many arguments favoring the death penalty, this does not hold up under factual analysis. The actual cost of execution, the cost of operation, the

super maximum security, condemned unit, the years spent by some inmates in condemned status, and a pro rata share of top level prison officials, time spent in administering the unit add up to a cost substantially greater than the cost to retain them in prison the rest of their lives."

Edmund G. Brown, former Governor of California, stated:

"I am unalterably opposed to capital punishment. It doesn't do a single, solitary bit of good and this has been proved time after time. As a matter of fact, it increases violence because when the State is guilty of a violent act it encourages the individual to be guilty of a violent act. This is seen by violence following a war or following an execution.

"I hate to base this opinion on costs, but the cost of killing an individual is far, far greater than if we gave him life in prison. The expenses of a trial, the delay, the additional guards, the lawyers' fees, the court fees are far greater than if life imprisonment were the penalty.

"I will do anything I can to see that capital punishment is abolished."

For Others:

When people who believe in the death penalty for all premediated murders are faced with the question: "Would you want your son, your daughter, your loved one, executed if he committed a premediated murder?" The answer invariably is no. It therefore is obvious that it is good enough for someone else, but not good enough for me.

I have experienced several cases, and can quote them if need be, where people have said to me that all murderers should be executed. Then a member of their family is faced with execution, and they immediately do an about face and want their loved one saved. That has happened several times.

I believe that capital punishment in Federal and States should be abolished. Our prison systems are set up on the concept that they must protect society and must work toward the rehabilitation of the offender. I believe that most prisoners, except for mental cases, can be changed for the better. A few will have to be kept under close confinement for the rest of their natural lives. When I left the prison system there was a man who had 49 years in prison at that time, several who had well over 30 years, still serving time. Some must die in prison. Some lifers do die in prison. They have committed murder. They were not sentenced to death. Some who have been sentenced to death would fall into this catgory, others could be changed.

I personally believe that the death penalty should be abolished. We have ample facilities to keep offenders away from society for the rest of their natural lives if warranted.

When the death penalty is stricken from our statutes, and the gas chambers, the hangman's noose, the electric chair, and the firing squad are done away with as the rack, the screw, burning at the stake, drowning, throwing to the lions, and other barbaric methods were "we will all be the better for it."

May I submit, as I have been asked to do, sir, copies photographs as Exhibit 1, San Quentin, one of the

largest prises in the Unites States, another is a photograph of the gallows that was used at one time.

This is where men are kept on condemned row in California's prison and similarly in other prisons.

This is a holding cell adjacent to the lethal gas chamber where the men are held the night before, until the next morning execution.

This is the lethal gas chamber with the door open.

This is the gas chamber with the door closed when the man is in there.

And the last one is where the witnesses stand, which are the legal witnesses.

Thank you.

Senator Hart. Warden, thank you very much. I felt strongly enough about this to introduce the bill to abolish capital punishment some several years ago, but if I had had any doubts about it, your description of what happens, when you and I as the State puts somebody to death would have resolved any doubts. And yet for this record I have an obligation to ask you some questions to be sure we have a balance here.

Mr. Duffy. Yes.

"Senator Hart: You described the hideous, barbaric scene as somebody springs the trap or drops the pellet or pulls the electric switch. You described the disfigured victim, and the reaction it produced among the witnesses. But I know perfectly well that this subcommittee will be met by the person who says, "Look, there is the same disfigurement, there is the same torture, there is the same horror visited by that man on an innocent member of society. Why are you so overwhelmed by

the sight which you describe, when the reason that that sight occurs is because that same individual went out on the street or went into a bedroom and took somebody who under nobody's definition deserved it, and did to him or her the same thing that you are now bewailing as society." What do you say when somebody comes to you with that reaction, and I am sure people must have come to you.

Mr. Duffy. They have said that to me many, many times, Senator, and my answer is similar to what I have said in my statement, that what these people have done is completely wrong, 100 percent wrong. There is no rhyme or reason for it. There should have been some other way that they should have handled this. Yes, it was wrong. But is it also right for somebody else to commit another murder?

We have always of handling these people. They do not have to be murdered, a second murder. They do not have to be done any other way than we are doing today, with hundreds of homicides. Put them away. Keep them away safe from society.

No, I do not condone what these people have done for a moment. It is horrible, terrible, but should we in State and Federal also commit another horrible act?

Senator Hart. I don't know how it will impress somebody who reads the record, just the black and white. I don't know to what extent it was your presence and your voice in reading the statement to us that affected, I am sure, everyone in this room as it did me, as you described a scene that few of us have seen, and after listening to you none of us will volunteer to see. But you know, the funny thing is that if we had a public

exhibition of what you describe, if as in days of old the village was brought to the scene and everybody saw what happened to the man who today is executed at San Quentin behind the walls, in the view of very few, one of two things would result I suppose. Someone would say, "That is the way to make capital punishment serve as a deterrent." If the village saw what you described, then nobody in that village would commit an act of violence.

My reaction is that if everybody saw what you have described, we would indeed abolish capital punishment. The village would just cry "Stop."

Mr. Duffy. I believe you are right, Senator, because in my book, "88 Men and 2 Women," which is on the death penalty, and believe me this is not a plug for the book because it is out of print, you cannot buy it, I say in there that if we held legal executions in Times Square, this is before New York abolished, or in front of the Tabernacle in Utah, or on the bandstand in Golden Gate Park in San Francisco, using cross country as an example, that I believe we would soon convince the public in their minds that we should abolish the death penalty.

Senator Hart. Mr. Paisley.

Mr. Paisley. Warden, you probably have often heard the argument that there can be no assurance that the killer will stay in for a life sentence. What do you say to that argument?

Mr. Duffy. You are correct. There is no assurance that anyone will stay in prison for a life sentence unless the law says that they must stay the rest of their natural life, and that is more of an assurance than a regular life sentence.

A life sentence, as far as I have experienced it, for those who have been released, runs between 12 and 13 years, with those people being the No. 1 best parolees, above all other types of crimes in the penal code. Very rarely has it been known that a released lifer has committed another murder.

I have often had that said to me on the speaker's stand before groups. "Why do you let all these murderers out to kill again?" And I asked one simple question; "Name one." And the person who asks that question cannot name one, because they are just talking.

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No. 13

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

WILLIAM L. MAXWELL, PETITIONER,

v.

O. E. BISHOP, Superintendent of Arkansas State Penitentiary,
RESPONDENT

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF AMICI CURIAE OF BERL I. BERNHARD, WILLIAM COLEMAN, SAMUEL DASH, JOHN W. DOUGLAS, STEVEN DUKE, WILLIAM T. GOSSETT, JOHN GRIFFITHS, RITA HAUSER, GEORGE N. LINDSAY, BURKE MARSHALL, MONRAD S. PAULSEN, STEVEN R. RIVKIN, WHITNEY NORTH SEYMOUR, JEROME J. SHESTACK, CYRUS R. VANCE, and JAMES VORENBERG, URGING REVERSAL

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 13

WILLIAM L. MAXWELL,
Petitioner,

v.

O. E. BISHOP,
Superintendent of Arkansas State Penitentiary,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF AMICI CURIAE OF BERL I. BERNHARD, WILLIAM COLEMAN, SAMUEL DASH, JOHN W. DOUGLAS, STEVEN DUKE, WILLIAM T. GOSSETT, JOHN GRIFFITHS, RITA HAUSER, GEORGE N. LINDSAY, BURKE MARSHALL, MONRAD S. PAULSEN, STEVEN R. RIVKIN, WHITNEY NORTH SEYMOUR, JEROME J. SHESTACK, CYRUS R. VANCE, and JAMES VORENBERG, URGING REVERSAL.

INTEREST OF AMICI CURIAE[1]

The *amici curiae* join to tender Argument to the Court on an aspect of this case which reflects the most funda-

[1] Pursuant to Rule 42, paragraph 2, there have been lodged with the Clerk the written consents of the parties to the filing of this Brief Amici Curiae.

mental dimensions of their individual professional responsibilities as members of the Bar.

The first motivation prompting this brief is a professional concern to preserve and develop the standards of fairness in the administration of justice standing at the heart of our constitutional structure. Each of the signers of this brief is familiar with the problems of criminal law enforcement and with the practical requirement that the American system of criminal justice function with substantial fairness to all accused of crime.

In addition, each of the signers of this brief has pledged his professional skills to the fulfillment for all Americans of civil rights under law. Since the context in which this case rises to Constitutional proportions is shaped by the factor of race, the signers consider Argument with respect to the bearing of this factor essential to the full and proper development of the questions fairly comprised in this case.

Because considerations of procedural fairness and racial justice come together in the constitutional issues here on review, the undersigned hereby respectfully tender this brief *amici curiae*.

ARGUMENT

I.

WITHOUT APPROPRIATE STANDARDS, THE ARKANSAS SINGLE-VERDICT PROCEDURE IS SUSCEPTIBLE TO RACIALLY MOTIVATED DECISIONS ON THE IMPOSITION OF THE DEATH PENALTY, IN VIOLATION OF THE CONSTITUTION'S DUE PROCESS AND EQUAL PROTECTION GUARANTEES.

Standards to guide juries in selecting convicted persons for capital punishment are essential to comply with the Due Process requirement that discretion be limited and that the criminal process include structural guarantees against decisions based on passion and prejudice, as well as the Equal Protection requirement that the State not invite racially motivated decisions. Appropriate standards can be devised by any State which wishes to delegate to juries the power to impose the death sentence.

A.

The death penalty for a "capital" offense has become the exception, rather than the rule, and this accentuates the need for standards to determine the occasions on which it is to be inflicted if administration of the death penalty is to meet Due Process requirements. The current rarity of the death penalty also destroys the support of tradition for the Arkansas practice.

Only a small fraction of persons convicted of offenses for which death is a possible penalty actually receive the death sentence, in Arkansas or anywhere else (see Petitioner's Appendix B, at 24a-34a). It is now unthinkable that any significant proportion of "capital" offenders could be put to death. Thus the definitions of so-called

"capital offenses" no longer reveal anything about the criteria by which the death sentence may be imposed. In capital cases, the absence of any relationship between the elements of the offense and the punishment imposed makes compelling the need for explicit standards to guide the jury. The sentencing jury in a capital case is empowered to select for a special and awesome penalty a very few victims from among the total pool of convicted persons. It should hardly require argument that the power to make such a selection cannot be delegated without any standards at all in a constitutional system which will not allow delegation of the power to impose court costs on an acquitted defendant as on a mere finding that he was guilty of "some misconduct" which "has given rise to the prosecution." *Giaccio v. Pennsylvania*, 382 U.S. 399 (1966). Due process of law is denied in the most fundamental way when a decision to forfeit life is made on the basis of *no legal rule at all*.

Earlier in our history, when the death sentence was a normal adjunct to a conviction, the definition of a capital crime generally provided some guidance for the occasions on which capital punishment would be inflicted, and made plausible the proposition that a jury might lawfully be left with unguided discretion to dispense mercy. There is unquestionably a great difference between discretion to reprieve and discretion to take a life. Ultimately, whether a situation involves the one or the other is a question of fact. The fact is that capital sentencing in 1969 consists of the selection of victims, not the selection of persons to be spared.

When a death sentence is no longer a serious possibility for the vast majority who commit the proscribed

offense, it becomes a fiction to pretend that the commission of the offense itself is the cause of the sentence. The offense has become an excuse to execute a man for other unrelated or virtually unrelated reasons. Perhaps such a system is permissible *but only if these collateral reasons are clearly prescribed.* Arkansas' juror, delegated the power to make society's most awesome choice, is given no criteria upon which to make it. He is left to his prejudices and his subconscious for the keys to decision. Often, as Petitioner's statistics at least strongly suggest, the juror is moved by his fear of difference and decides to impose the death penalty upon the defendant because of his race.

The disappearance of the death penalty as a normal consequence of conviction for even the most heinous offenses has not only enlarged the operational content of jury "discretion", and created the necessity for standards, it has eliminated tradition as a ground for perpetuating the Arkansas practice. The issue now before the Court is vastly different from what it might have been even a few decades ago, though it remains clothed in the same conceptual garments.

B.

The Arkansas procedure is tantamount to an instruction that race may be taken into account and is thus a deprivation of Equal Protection of the Laws.

If an Arkansas court, or any other court, were to charge a sentencing jury that it could consider race in deciding defendant's fate, a sentence imposed by such a jury would be void with no proof whatever that the jury

had actually been racially motivated in fixing the sentence (see Petition for Certiorari, pp. 45–47). The same Constitutional rule is *a fortiori* where the sentence is death. Our system of jury trials rests on the assumption that juries are guided and influenced by what they are and are not told by the presiding judge. Countless convictions are reversed every year in every jurisdiction for error in the charge. It is not uncommon for a conviction to be reversed for the sole reason that an instruction, though not erroneous, was unclear or confusing. See Wright, Federal Practice and Procedure (Criminal) Section 485, 487 (1969). Numerous convictions have been upset for no other reason than the failure of the court to construct fully on some basic point (e.g., reasonable doubt, the presumption of innocence, or the elements of the offense). Wright, *supra*, n. Sections 485, 487. In such cases, it is no answer that the jury probably understood anyway, that the omissions were supplied in summation, that guilt was clear, or that the point was not really in issue. The *possibility* of misunderstanding is enough to vitiate the proceedings. This Court has applied the same rule where the error in the instructions is of constitutional dimension. Compare *Rogers v. Richmond*, 365 U. S. 534, 541, 544 n. 11 (1961) with *Jones v. Mississippi*, 353 U. S. 502, 520 (1947) and *Sullivan v. Louisiana*, 508 U. S. 275, 278 (1993).

A brief examination of the context in which petitioner's jury was charged compels the conclusion that some, if not all, of his jurors probably understood the charge as authorizing them to take race into account in deciding his fate. At the time of petitioner's trial, Arkansas law required the selection of jurors from electors, defined as those who had paid their county

poll tax, and the names of such persons were required to be kept in a poll tax book where they were designated by race. The jury list itself indicated race (Petition for Certiorari, p. 75a). As recently as 1968, the Arkansas miscegenation statute was being enforced, although declared unconstitutional in *Loving v. Virginia*, 388 U.S. 1 (1967). See *Higgins v. Peters*, U.S. District Court No. LR-68-c-176, E.D. Ark., September 25, 1968 (declaring the Arkansas statute invalid at the behest of a Negro man and a white woman who were denied a marriage license). During the thirty-two years immediately preceding petitioner's trial, Arkansas executed only 1 white man for rape while executing 17 Negroes (Petition for Certiorari, p. 87, n. 21). Surely, no more extensive reconstruction of the Arkansas social fabric of 1962 is needed to show that the milieu from which petitioner's jury was selected, and in which it decided that he should die, was, at the very least, tolerant of the view that rape by a Negro was a more heinous offense than the same crime by a white or that the life of a Negro defendant is less precious than that of a white. Not having been told otherwise by the court, it is altogether likely that the jury interpreted the submission of the death penalty issue, without express instruction, as authorization to take race into account. The likelihood is certainly at least as great as the possibility of jury misunderstanding underlying the decisions cited above, or the assumption that a jury which hears a prosecutor's comment on the defendant's failure to take the stand will feel authorized to take it into account (*Griffin v. California*, 380 U.S. 609 (1965)). Indeed, if as we contend an Arkansas jury would infer that race is a permissible consideration in assessing penalty from the submission as given, its understanding would have

been correct, for, in placing the issue of life or death in the unrestricted discretion of the jury, the State of Arkansas *does* authorize the jury to consider race, or any other irrelevant or impermissible factor.

Since, as we have pointed out, possible misunderstandings of basic issues, attributable either to what the jury was told or to what it was *not* told, suffice to vitiate a garden variety of conviction, how can a wholly different standard be applied when a life is to be taken? The only conceivable distinction was rejected by this Court when it noted that while deciding between life or death is

> "different, in kind from a finding that the defendant committed a specified offense . . . this does not mean that basic requirements of procedural fairness can be ignored simply because the determination involved in this case differs in some respects from the traditional assessment of whether the defendant engaged in the proscribed conduct." *Witherspoon v. Illinois*, 391 U.S. 510, 521, n. 20 (1968).

In simply submitting the issue of life or death, without comment, the trial court, in the context and under the circumstances, conveyed a gross misconception which deprived petitioner of Equal Protection of the Laws and necessarily voided his death sentence.

C

Even if it be assumed, against all the evidence, that the death penalty was not discriminatorily inflicted upon petitioner, Due Process compels the introduction of protections against the apparent risk of such discrimination.

Petitioner abundantly proved in the District Court that "Negro defendants who rape white victims have been disporportionately sentenced to death by reason of race, during the years 1945-1965 in the State of Arkansas." (Petitioner's Brief, p. 19), and the Court of Appeals seemed to agree. The statistics for the nation at large strongly imply that what is true in Arkansas is true in the entire South (Id. at 13-14). Accumulated experience and professional opinion is virtually unanimous, moreover, that throughout the nation, "the death sentence is disproportionately imposed and carried out on the poor, the Negro, and the members of unpopular groups." President's Commission on Law Enforcement and Administration of Justice, Report (The Challenge of Crime in a Free Society) (1967) 143.

The Court of Appeals was wrong in holding that petitioner was obliged to prove that his particular jury was racially motivated, and that he failed to do so. Moreover, no such impossible burden need be met to establish, at the very least, that there was a substantial risk that a totally uninstructed jury would give vent to impermissible passions and prejudices in imposing the death penalty. It would be rank hypocrisy to deny that such a risk existed and was substantial. Nothing more is needed to make it incumbent upon a court to take measures to counteract the risk. Compare *North Carolina v. Pearce*, 395 U.S. 711 (1969), where this Court recently held that explicit findings are essential to protect a defendant against the apparent risk that his sentence might be based upon an impermissible consideration (there, penalty for a prior appeal).

At the heart of our concepts of Due Process and fair trial is the notion that the process must be so structured

as to minimize passion, prejudice or corrupt motives as ingredients of decision. Trials must not only be fair in fact, they must appear fair as well. "Justice must satisfy the appearance of justice." *Offutt v. United States*, 348 U.S. 11, 14 (1954). *In re Murchison*, 349 U.S. 133, 136 (1955). See also, *Estes v. Texas*, 381 U.S. 532, 542 (1965). There are myriad cases in which this Court has refused to inquire behind the *apparent* unfairness of a practice to see whether in the particular case actual prejudice was effected. See, *e.g.*, *Tumey v. Ohio*, 273 U.S. 510 (1927) where the judge's financial interest (to the tune of $12) in the outcome of a case was enough to invalidate his judgment. "Every procedure which would offer a possible temptation to the average man . . . not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law." (273 U.S. at 532). A fine of $100 was involved. *A fortiori*, the substance and appearance of fairness are required where life is at stake, not merely in the determination of guilt and innocence, but in the sentencing procedure as well. Indeed, because there is so little connection between conviction and the death penalty, it is the sentencing process which particularly demands adherence to fair procedures.

There are many cases in which this Court has held that specific steps must be taken to ensure the fairness and protect the appearance of fairness of criminal trials. The idea that Due Process involves affirmative protective measures is nothing new. See *e.g.*, *Sheppard v. Maxwell*, 384 U.S. 333, (1966), where the Court stated that Due Process requires trial judges to "take strong measures to ensure that the balance is never weighed against the

accused" there, by possibly prejudicial publicity; here, we would argue, by the risk of race prejudice. *Cf.* also *Spencer v. Texas*, 385 U.S. 554 (1967) (instructions that prior crimes, introduced pursuant to a recidivist statute, could not be taken into account as to guilt).

A system which authorizes predominantly white, middle class juries to mete out a death sentence to anyone they convict of a so-called "capital" offense, for any reason or for no reason, and which promises those juries that they will never be compelled to reveal or to articulate their reasons or lack of reasons, and which results in the disproportionate infliction of the death penalty on Negroes, plainly fails in its duty both to be and to appear fair. Due Process in its most elemental sense is glaringly denied.

Although about as likely as the moon's being a mirage, it is nonetheless *possible* that no jury ever voted to kill a defendant because of the color of his skin, his social status, or his economic condition. Though every known attempt of social scientists to determine the nexus between the death penalty and race in the American South has failed to exclude the link, though every known statistical study shows a connection, though virtually all students of the subject believe that there is a causal relationship, everybody *must* be wrong. Everyone may also be wrong that prejudicial publicity, as in *Sheppard*, *supra*, wreaks prejudice. The point is that so long as the data is such as to persuade virtually everyone who examines it that juries are executing people because they are Negro, Due Process demands that the sentencing process include measures to counteract the apparent risk of unconstitutional discrimination. Surely, the likelihood of sentencing based upon an impermissible consideration has

been far more clearly demonstrated in this case than it was in *Pearce*, *supra*, where this Court relied mainly upon the State's failure affirmatively to demonstrate a *proper* basis. The Due Process need for prophylactic rules requiring specific findings, as in *Pearce*, or at least instructions to the jury on permissible and impermissible consideration follows *a fortiori* in this case. The awesome factor of death adds immeasurably to the need.

The State of California contends that "If Arkansas jurors are . . . bent on racial discrimination, there is no reason whatever to believe that they will be deterred in carrying out such discrimination by any instruction or combination of instructions which a judge may read to them." (Brief of California *Amicus Curiae*, in Support of Respondent, p. 26). Yet at the very center of our jury system is the assumption that instructions are followed. *Cf. Spencer v. Texas*, *supra*, at 565 (1967). If that assumption were abandoned, the entire system of jury trials and appellate review would lie without foundation. Furthermore, even if the Court, laying aside that basic assumption underlying our jury system, were to assume that instructions to juries regarding the death penalty would be ignored, Due Process would nonetheless compel the State of Arkansas to remove its *imprimatur* from the lawless acts of its juries. Compare, *Griffin v. California*, 380 U.S. 609, 614 (1965). If Arkansas jurors were told by the court, either expressly or by fair implication from its submission of criteria, that they could not kill on account of race, the State would at least have obtained, at virtually no cost, some distance from the suspicion of discrimination. When it fails to do so, it seems to many fair minded observers to condone racially motivated executions.

The Arkansas procedure thus feeds the most corrosive suspicions one can entertain about a legal system, surely outranking, in its capacity to produce distrust and disrespect for law, the use of forced confessions or illegal searches to obtain convictions, and other practices which this Court has condemned and for which it has fashioned prophylatic rules to protect constitutional rights.

D.

The standards for imposition of the death penalty which Due Process and Equal Protection require are readily available.

We have shown three ways in which the Arkansas delegation, without standards, of the power to select a few persons for capital punishment violates fundamental constitutional norms. The basic ingredient of standards which is absent from the California procedure could easily be supplied. The Model Penal Code, for example, which establishes prerequisite findings and enumerates aggravating and mitigating circumstances (American Law Institute, Model Penal Code, Section 210.6, pp. 128-132), gives definite standards and informs the jury, by clear implication, that it may not impose the death penalty for any other reasons: not because of skin color, nor of social standing, nor of economic condition. But as in *Giaccio*, this Court is not called upon to determine what the particular criteria must be; only that there must be *some* definite criteria set by every State which chooses to authorize its juries to select those upon whom capital punishment is to be imposed.

II

THE SINGLE-VERDICT PROCEDURE COMPOUNDS THE VICES OF STANDARDLESS SENTENCING AND IMPOSES NEEDLESS AND IMPERMISSIBLE BURDENS ON THE RIGHT TO A FAIR TRIAL ON THE ISSUE OF GUILT OR INNOCENCE

As petitioner has amply shown (Petitioner's Brief, at pp. 66-78), a defendant in a capital case in Arkansas is faced with a grisly choice. He is permitted to adduce mitigating evidence on the penalty question only at the price of surrendering his right to a full and fair trial on the issue of guilt and his right not to incriminate himself. This is enough to invalidate the procedure. Yet the choices are even grislier than petitioner suggests. If an Arkansas rape defendant really fears that his life will be forfeit and is bent on saving it, he may be well advised not merely to surrender his right not to testify, and to forego the defense of consent and other trial rights, but also to yield his very right to be tried. Only by pleading guilty can he maximize his chances of saving his life.

Even leaving out of account (which the Court should by no means do) the widespread practice of guilty plea bargaining, the Arkansas defendant who pleads guilty, although not thereby absolutely immunizing himself (in absence of a plea bargain to that effect) from the death sentence, as in *United States v. Jackson*, 390 U.S. 570 (1968), will nonetheless have purchased a sentencing jury which is entirely uncontaminated by the trial of guilt.[2]

[2] If an Arkansas defendant pleads guilty to rape, empanelment of a jury to fix the sentence is mandatory. *Scarbet v. State*, 226 Ark. 503, 291 S.W. 2d 241 (1956).

one which hopefully will hear and sift his mitigating evidence with a relatively sympathetic ear. The defendant who pleads guilty will not, after all, have "compounded his offence" by denying it. His one and only appearance before the jury will be in the role of a repentent sinner. The evidence and arguments he adduces will not be contradicted, watered down, confused, or compromised by the trial of guilt. His chances of living may be enhanced manyfold. The choices open, and the pressures at work, are not, therefore, different in kind from those in *Jackson*. Here, as in *Jackson*, the procedure for assessing the death penalty needlessly burdens the exercise, not only a Fifth Amendment rights, but also of the Sixth Amendment right to a trial on the question of guilt.[1]

The Court's recent decision in *North Carolina v. Pearce*, *supra*, re-emphasized the importance of insulating the exercise of constitutional rights against pressures to forego them. In *Pearce*, the Court held that the danger to the free exercise of both constitutional and non-constitutional rights, the constitutional right to seek a fair trial and

[1] It is of no consequence that the petitioner resisted the pressures to yield his right to a trial which are inherent in the Arkansas system. The petitioner in *Griffin v. California*, 380 U.S. 609 (1965), also resisted the temptation to surrender his right not to testify, which was produced by the threat of comment thereon, yet his conviction and sentence were reversed, and the defendants, Pearce and Rice, in *North Carolina v. Pearce*, *supra*, also withstood the pressures against taking an appeal which was produced by the risk of an increased sentence at a second trial, yet their sentences were reversed. Petitioner Maxwell, like Griffin, Pearce and Rice, paid the price of resistance. In Griffin, the price was adverse comment and its potential effect on conviction; in *Pearce*, the price was the increased sentence. In Maxwell's case, the price was a sentencing jury which was potentially contaminated, inflamed, and prejudiced by the trial of guilt.

the non-constitutional right to appeal or collateral attack inherent in the possibility of a heavier sentence upon retrial must be minimized by judicial articulation of a basis for any such heavier sentence which excludes impermissible penalization. Explicit findings were held necessary to assure prospective appellants or petitioners that they run no risk of being penalized for the exercise of their rights.

The Arkansas capital defendant who resists the pressures to plead guilty faces a trial on the issues of guilt, and, if found guilty, punishment, at which he is guaranteed both constitutional and non-constitutional rights. But given the unlimited capital sentencing discretion conferred by Arkansas law, he exercises these rights at his grave peril. He may be sentenced to death for any reason the jury chooses (or for different reasons the individual jurors choose), and the reasons for his enhanced sentence remain silent, uncontrontable and unreviewable. He may be sentenced to death because he did not take the witness stand or because he did take the stand (and claimed the prosecutrix in a rape case consented), or because he raised the defense of insanity or because he failed to raise it. Indeed, every trial decision whether to exercise his substantial rights requires a "guess and a gamble," *White v. Balkcom*, 333 F. 2d 496 (5th Cir. 1964), in which the stakes are his life, for the jury may choose to kill him for pursuing his rights.

True, every trial on the issue of guilt entails risks in the choice of trial tactics, but the defendant is not placed "in the dilemma of making an untree choice." *North Carolina v. Pearce, supra*, 395 U.S. at 724 (quoting from *Worcester v. Commissioner*, 370 F. 2d 713, 718), for with re-

spect to guilt the defendant knows that the jury would be instructed what *to* consider and often what *not* to consider. See *Griffin v. California, supra*. But the Kansas single-verdict standardless capital sentencing proceeding intertwines and confuses the issues of guilt and penalty while allowing the jury free reign to condemn the defendant for any reason at all. So that not only is the capital defendant placed in a position where trial on the issue of guilt conflicts with trial on the issue of penalty, but also in deciding on how to proceed in trying these issues he is confronted with choices which entail the exercise or relinquishment of guaranteed rights while forewarned that the jury is free to make death the price.

Mr. Justice Black stated the pertinent principles in *North Carolina v. Pearce*:

> "[A] State cannot permit appeals in criminal cases and at the same time make it a crime for a convicted defendant to take or win an appeal. That would plainly deny due process of law. . . . The very enactment of two statutes side by side, one encouraging and granting appeals and another making it a crime to win an appeal, would be contrary to the very idea of government by law. It would create doubt, ambiguity, and uncertainty, making it impossible for citizens to know which one of the conflicting laws to follow, and would thus violate one of the first principles of due process." 395 U. S., at 738–739 (Black, J., concurring and dissenting).

The State of Arkansas has afforded the capital defendant numerous rights in his defense, many guaranteed by the federal Constitution, but the State . . . has made it a crime, first punishable by death at the discretion of the jury, to exercise those rights. And, as Mr. Justice Black

has pointed out, for the State to confront a defendant with such a dilemma is "contrary to the very idea of government by law. It . . . create[s] doubt, ambiguity, and uncertainty, making it impossible to know which one of the two conflicting laws to follow". *Ibid.* And what Mr. Justice Black concluded in the context of a State's permitting appeals while at the same time taxing the exercise of the right to appeal is applicable here as well: It "violate[s] one of the first principles of due process." *Ibid.*

The similarity of this case to *Jackson*, *Griffin*, and *Pearce* makes clear that petitioner, in asking the Court to invalidate the standardless unitary trial as it exists in Arkansas, asserts no novel principles. He seeks only plainly warranted relief from a procedure which is destructive of a constellation of well established and most fundamental constitutional rights.

CONCLUSION

The decision of the Court of Appeals for the Eighth Circuit should be reversed.

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Brief for the Amici Curiae have been served by mail, postage prepaid, this 24th day of October, 1969, upon counsel for the respondent, Joe Purcell, Attorney General of Arkansas, Department of Justice, Little Rock, Arkansas, 72201, and on counsel for the petitioner, Michael Meltsner, 10 Columbus Circle, New York, New York, 10019.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 13

WILLIAM L. MAXWELL, *Petitioner,*

v.

O. E. BISHOP, SUPERINTENDENT OF ARKANSAS STATE PENITENTIARY, *Respondent.*

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR THE AMERICAN PSYCHIATRIC ASSOCIATION AS AMICUS CURIAE

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Weihofen, "The Urge To Punish" (1956) 5

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 13

WILLIAM L. MAXWELL, *Petitioner*,

v.

O. E. BISHOP, SUPERINTENDENT OF ARKANSAS STATE PENITENTIARY, *Respondent*.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF FOR THE AMERICAN PSYCHIATRIC ASSOCIATION AS AMICUS CURIAE

INTEREST OF THE AMICUS CURIAE

The American Psychiatric Association is a nonprofit organization incorporated in the District of Columbia with a present membership of over 17,000 psychiatrists located throughout the United States. Founded in

Philadelphia in 1844 as the Association of Medical Superintendents of American Institutions for the Insane, the Association is the oldest continuing national medical society in the United States. In 1921 the present name of the organization was adopted, and in 1927 the Association was incorporated in the District of Columbia.

The American Psychiatric Association is a society of medical specialists brought together by a common interest in the continuing study of psychiatry, in working together for more effective application of psychiatric knowledge to combat the metal illnesses, and in promoting mental health of all citizens. Among the Association's earliest accomplishments was its participation in the transfer of the mentally ill from jails and almshouses to medical institutions, and in the inauguration of a program of moral treatment that embodied the rudiments of modern community psychiatry. In the Association's constitution its objectives are stated as follows:

> To further the study of the nature, treatment, and prevention of mental disorders and to promote mental health.
>
> To promote the care of the mentally ill.
>
> To further the interests, the maintenance, and the advancement of standards of all hospitals for mental disorders, of out-patient services, and of all other agencies concerned with the medical, social, and legal aspects of these disorders.
>
> To make available psychiatric knowledge to other branches of medicine, to other sciences, and to the public.

In furtherance of the purposes of the Association, its governing Board of Trustees adopted a resolution

at its December 12, 1969, meeting condemning capital punishment and authorizing the filing of this brief amicus curiae. The resolution of the Board of Trustees is set out below:

RESOLUTION

> Resolved, that the American Psychiatric Association, through its Board of Trustees, opposes the death penalty and calls for its abolition. The best available scientific and expert opinion holds it to be anachronistic, brutalizing, ineffective and contrary to progress in penology and forensic psychiatry.

This brief is filed amicus curiae for the Association in order to bring before this Court some psychiatric views of capital punishment which have not heretofore been stressed in this case. Consent of the parties for the filing of the amicus curiae brief has been sought and obtained. Copies of the parties' letters will be submitted to the Clerk with this brief.

ARGUMENT

This brief amicus is prompted by the submission of respondent herein:

> "1. What the case really involves is whether the jury system is a workable procedure in capital cases. Petitioner contends that he would have no complaint to a jury's deciding the question of life or death if framed by adequate rules. But it is earnestly submitted by respondent that a set of rules could never be drafted which would both protect the rights of the accused and the interest of the State."[1]

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[1] Brief for Respondent, p. 3.

In other words, respondent concedes that the death penalty, jury trials, and fairness to the parties cannot co-exist. Since trial by jury is Constitutionally mandated, *Bloom* v. *Illinois*, 391 U.S. 194 (1968), the question on respondent's own premises is whether the retention of the death penalty is of such importance to society that a system which does not "both protect the rights of the accused and the interest of the State" may Constitutionally be retained. Assuming, without conceding, that fundamental unfairness in a criminal case can ever be excused by such an argument of necessity, we here demonstrate that far from being essential to the welfare of society, the death penalty is in fact detrimental and thus cannot excuse a procedure which is fundamentally unfair. It is, therefore, unnecessary for us to discuss the broader Constitutional question of whether the retention of the death penalty itself violates the Fifth or Eighth Amendments.

We deem of special relevance to this presentation Sigmund Freud's views on capital punishment:

> [P]unishment not infrequently offers, to those who execute it and who represent the community, the opportunity to commit, on their part, the same crime or evil deed under the justification of exacting penance. Only the fact that mankind shrinks from facing facts, from acknowledging the facts of unconscious emotional life, delays the victory of the concept of capital punishment as murder sanctioned by law.[2]

The irrationality of the imposition of capital punishment has special concern for psychiatrists, for the

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[2] Reik, "Freud's View on Capital Punishment", *The Compulsion to Confess* 473 (1959).

recurrent preoccupation with death by all human beings is a fact of special psychiatric importance and thereby places psychiatrists in a unique position to evaluate the death penalty.[3]

It is the position of amicus that imposition of the death penalty is so costly to society, to the administration of a system of criminal justice, and to the sentenced individual as to require that this sanction be abolished. All of the serious studies of deterrence have concluded that there is no evidence that the death penalty has deterrent efficacy.[4] Indeed, as has been pointed out,[5] far from serving as a deterrent, capital punishment may actually serve as an incitement to crime among various types of mentally unstable potential offenders:

(1) The suicidal group, which includes depressed patients who adopt the attitude that death is the only

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[3] See Cohen, "Psychiatrists Look at Capital Punishment", 29 Psychiatric Digest 45 (1968).

[4] "It is generally agreed between the retentionists and abolitionists, whatever their opinions about the value of comparative studies of deterrence, that the data which now exists show no correlation between the existence of capital punishment and lower rates of capital crime." United Nations Department of Economic and Social Affairs, Capital Punishment (ST/SOA/SD/9-10) (1968) 123. See also, Royal Commission on Capital Punishment 1949-1953, Report (H.M.S.O. 1953) 18-24, 58-59, 328-380; President's Commission on Law Enforcement and Administration of Justice, Report (The Challenge of Crime in a Free Society) (1967) 143; New York State, Temporary Commission on Revision of the Penal Law and Criminal Code, Special Report on Capital Punishment (1965) 2; Pennsylvania Joint Legislative Committee on Capital Punishment, Report (1961) 9, 20-29.

[5] *E.g.*, Hart, "Punishment and Responsibility", 86-88 (1968); Weihofen, "The Urge to Punish" 161 (1956).

just punishment for their imagined sins and commission of capital offenses is a means of securing it.

(2) Those to whom the lure of danger has a strong appeal. The prospect of being caught and being sentenced to death serves as an actual incentive to crimes of violence.

(3) The exhibitionist who is fascinated with the idea of pitting his wits against the police and thereafter being the central figure at a spectacular murder trial.

In his paper "A Psychiatrist Looks at the Death Penalty" presented at the 122nd annual meeting of the American Psychiatric Association on May 11, 1966, Dr. Louis J. West elaborated upon the thesis that the death penalty breeds murder in that it becomes "a promise, a contract, a covenant between the society and certain warped mentalities who are moved to kill" (*Id.* at 3), by a series of case illustrations:

> "Recently an Oklahoma truck driver was stopping for lunch in a Texas roadside cafe. A total stranger—a farmer from nearby—walked in the door and blew him in half with a shotgun. When the police finally disarmed the man and asked why he had done it, he replied, 'I was just tired of living.'
>
> "In 1964 Howard Otis Lowery, a life-term convict in an Oklahoma prison, formally requested a judge to send him to the electric chair after a District Court jury found him sane following a prison escape and a spree of violence. He said that if he could not get the death penalty from that jury he would get it from another, and complained that officials had failed to live up to an agreement to give him death in the electric chair.

when he pleaded guilty to a previous murder charge in 1961.

"Another murderer, James French, asked for the death penalty after he wantonly killed a motorist who gave him a ride while hitchhiking through Oklahoma in 1958. However, he was 'betrayed' by his Court-appointed attorney who pleaded him guilty and got him a life sentence instead of the requested execution. Three years later French strangled his cellmate for no obvious reason: a deliberate, premeditated slaying. He has been convicted three times for that crime, declared legally sane and sentenced to death each time. This sentence he deliberately invites in well-organized, literate epistles to the Courts and in provocative challenges to the jurors. During a psychiatric examination in 1965 French admitted to me that he had seriously attempted suicide several times in the past but 'chickened out' at the last minute, and that a basic motive in his murdering another prisoner was to force the State to deliver the electrocution to which he feels entitled and which he deeply desires."[6]

Thus, while there may be isolated and anecdotal reports of persons who have been dissuaded from committing capital crimes by fear of the death penalty, the worth of such fragile evidence[7] as support for continuation of capital punishment is, in our opinion, clearly overcome by the documented findings of instances where the death penalty encourages capital crime.[8] Moreover, there is substantial evidence that

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[6] West, *supra*, at pp. 3-4.

[7] Generally, such evidence is unsustained by objective evidence. See, *e.g.*, Canada, Joint Committee of the Senate and House of Commons on Capital Punishment, Report (1956), paras. 29-33, 43-52.

[8] See particularly Hart, *supra*, n. 5, at p. 88.

the death penalty creates a breeding ground for psychosis in death row. Very often prisoners deteriorate rapidly following the imposition of the death penalty. In their study of eighteen men and one woman awaiting death in the Sing Sing death house, Drs. Harvey Bluestone and Carl L. McGahee[9] noted in virtually every case studied the presence of degenerative psychological effects, including delusion, persecution, and withdrawal as the human mind attempted, in the environment of death row, to set up defenses against intense anxiety or the paralyzing depression occasioned by thought of the inevitable and impending end. Dr. West examined Jack Ruby, the convicted killer of Lee Harvey Oswald, a number of times and noted that by every objective medical criterion Ruby had become grossly psychotic since he had been sentenced to death.[10] The stress on Jack Ruby in the relatively short period of time between his sentence and death was rather less than that experienced by many condemned individuals who over the course of several years approach scheduled death down to the last month, or week, or minute, only to live through a breathtaking reprieve or perhaps face another countdown.

A good many of these doomed men require psychiatric care prior to execution, but the requirements of legalized death dictate that when the psychiatrist has improved his patient's condition, he must specify him as ready for execution. This phenomenon,

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[9] Bluestone and McGahee, "Reaction to Extreme Stress: Impending Death by Execution," 119 Am.J. of Psychiatry 393 (Nov. 1962).

[10] West, *supra*, at p. 5.

that only a sane man can be lawfully executed, has historic roots in the "unbroken command of English law for centuries preceding the separation of the Colonies" (*Solesbee* v. *Balkcom*, 339 U.S. 9, 20 (1950) (dissenting opinion of Mr. Justice Frankfurter)). At its earliest stages of development, the common law prohibited execution of the insane, "because by intendment of law the execution of the offender is for example, *ut poena ad paucos, metus ad omnes perveniat*, as before is said: but so it is not when a mad man is executed, but should be a miserable spectacle, both against law, and of extreame inhumanity and cruelty, and can be no example to others." (Coke, Third Institutes 6 (1644)). That this phenomenon of the mind breaking down under the stress of an impending execution is a commonplace of the death penalty is reflected by the several cases which have presented to this Court the problem of insanity supervening after sentence of death,[11] and by the fact that virtually every state has provided some mechanism for suspension of execution of the death penalty upon insanity supervening after sentencing.[12]

In addition to the cost of administering capital cases from trial through final appeal and during the long periods of detention that invariably follow im-

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[11] *E.g.*, *Caritativo* v. *California*, 357 U.S. 549 (1958); *Solesbee* v. *Balkcom*, 339 U.S. 9 (1950); *Phyle* v. *Duffy*, 334 U.S. 431 (1948); *Nobles* v. *Georgia*, 168 U.S. 398 (1897).

[12] See Mr. Justice Frankfurter's dissenting opinion and appendix of pertinent state legislation and judicial decisions, *Solesbee* v. *Balkcom*, 339 U.S. at 14 *et seq.*

position,[13] there would appear to be a greater psychic strain upon the participants in a capital case than in a criminal matter involving lesser sanctions. There are a number of examples of capital cases where the persons who comprised the criminal jury publicly reflect upon and attempt to repudiate their prior determination. Thus, in the case at bar, eleven of the twelve jurors have publicly declared that "upon reflection, they thought his [petitioner's] sentence should be reduced to life imprisonment."[14] Indeed, in the present case the enormity of involvement in capital punishment has motivated the complaining witness as well as the prosecuting attorney to disavow an interest in having petitioner executed.[15] We submit, in short, that the harm caused by the necessity of processing a

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[13] See, for example, a recent newspaper account:

"Billie Austin Bryant was sentenced yesterday to imprisonment for life in a maximum security federal penitentiary without possibility of parole for the murder of two FBI agents last January. * * * In deciding against the death penalty, Judge Gesell [of the United States District Court for the District of Columbia] said, he was not moved by any 'religious, philosophical, ethical, scientific or political controversy or criticism' on capital punishment. 'Purely practical matters controlled the court's decision in this case.'

Imposition of the death penalty, the judge said, would keep Bryant 'indefinitely in the death cell of our antiquated jail,' where he cannot be controlled, while appealing the death sentence.

'The Court has concluded that it would not serve the ends of effective justice to allow the defendant the luxury of all the special attention a capital penalty would generate.' * * * "

Washington Post, Nov. 4, 1969, § A, at 3, col. 5-6.

[14] N.Y. Times, Oct. 12, 1969, § 6 (Magazine) at 60.

[15] *Id.*

capital punishment case to its terrible conclusion[16] is so costly as to warrant the conclusion that capital punishment is unnecessary to the progress of our society and should not be permitted in the case at bar.

CONCLUSION

For the foregoing reasons, amicus submits that the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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[16] See the following declamation of a sentencing judge: "What I am about to say is not easy for me. I have deliberated for hours, days and nights. I have carefully weighed the evidence. Every nerve, every fiber of my body has been taxed. I am just as human as are the people who have given me the power to impose sentence. I am convinced beyond any doubt of your guilt, I have searched the records—I have searched my conscience —to find some reason for mercy—for it is only human to be merciful and it is natural to try to spare lives. I am convinced, however, that I would violate the solemn and sacred trust that the people of this land have placed in my hands were I to show leniency to the defendants Rosenberg." (Transcript of Record, p. 1616, *Rosenberg v. United States*, Nos. 111 and 112, Oct. Term 1952).

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 13.—October Term, 1969

William L. Maxwell, Petitioner, v. O. E. Bishop, Superintendent, Arkansas State Penitentiary.	On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

[June 1, 1970]

Per Curiam.

In 1962 the petitioner was found guilty of rape by an Arkansas jury without a verdict of life imprisonment, and the trial court imposed a sentence of death.[1] The Arkansas Supreme Court affirmed the judgment of conviction. 236 Ark. 694, 370 S. W. 2d 113. The petitioner then sought a writ of habeas corpus in the United States District Court for the Eastern District of Arkansas, claiming, among other things, that his conviction and punishment were unconstitutional in that (1) the jury had determined the two issues of guilt or innocence and of a life or death sentence in a single proceeding, thereby precluding him from presenting evidence pertinent to the question of penalty without subjecting himself to self-incrimination on the issue of guilt; and (2) the jury had been given no standards or directions of any kind to guide it in deciding whether to impose a sentence

[1] At the time of the petitioner's trial Arkansas law provided only two alternative sentences upon conviction for rape:

"*Penalty for rape.*—Any person convicted of the crime of rape shall suffer the punishment of death [or life imprisonment]." Ark. Stat. Ann. § 41-3403 (1964 Repl. Vol.).

"*Capital cases—Verdict of life imprisonment.*—The jury shall have the right in all cases where the punishment is now death by law, to render a verdict of life imprisonment in the State penitentiary at hard labor." Ark. Stat. Ann. § 43-2153 (1964 Repl. Vol.).

of life imprisonment or death. The District Court denied the writ. 257 F. Supp. 710, and the Court of Appeals for the Eighth Circuit affirmed, 398 F. 2d 138. We granted certiorari limited to the two questions noted above. 393 U. S. 997.

The petitioner's trial took place long before this Court's decision in *Witherspoon* v. *Illinois*, 391 U. S. 510. The trial transcript makes evident that several prospective jurors were removed from the panel upon grounds held impermissible in the *Witherspoon* case. One prospective juror, for example, was successfully challenged for cause solely on the basis of the following exchange:

> "Q. If you were convinced beyond a reasonable doubt at the end of this trial that the defendant was guilty and that his actions had been so shocking that they would merit the death penalty do you have any conscientious scruples about capital punishment that *might* prevent you from returning such a verdict?
>
> "A. I *think* I do." (Emphasis supplied.)

Another venireman was removed from the jury on the basis of the following question and answer:

> "Q. Do you entertain any conscientious scruples about imposing the death penalty?
>
> "A. Yes, I am afraid I do."

Still another member of the panel was dismissed after the following colloquy:

> "Q. Mr. Adams, do you have any feeling concerning capital punishment that would prevent you *or make you have any feelings about* returning a death sentence if you felt beyond a reasonable doubt that the defendant was guilty and that his crime was so bad as to merit the death sentence?

"A. No, I don't believe in capital punishment." (Emphasis supplied.) [2]

As was made clear in *Witherspoon*, "a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction." 391 U. S., at 522. We reaffirmed that doctrine in *Boulden* v. *Holman*, 394 U. S. 478. As we there observed, it cannot be supposed that once such people take their oaths as jurors they will be unable "to follow conscientiously the instructions of a trial judge and to consider fairly the imposition of the death sentence in a particular case." 394 U. S., at 484. "Unless a venireman states unambiguously that he would automatically vote against the imposition of capital punishment no matter what the trial might reveal, it simply cannot be assumed that that is his position." *Witherspoon* v. *Illinois*, *supra*, at 516 n. 9.

> "The most that can be demanded of a venireman in this regard is that he be willing to *consider* all of the penalties provided by state law, and that he not be irrevocably committed, before the trial has begun, to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceedings. If the *voir dire* testimony in a given case indicates that veniremen were excluded on any broader basis than this, the death sentence cannot be carried out . . . ." *Id.*, at 522 n. 21.

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[2] The record shows possible violations of the *Witherspoon* rule in the removal from the venire of at least four other prospective jurors.

It appears, therefore, that the sentence of death imposed upon the petitioner cannot constitutionally stand under *Witherspoon* v. *Illinois*. As in *Boulden* v. *Holman*, however, we do not finally decide that question here. The situation in this case closely resembles that presented in *Boulden*, in that the petitioner's trial took place before the *Witherspoon* decision, and the *Witherspoon* issue was not raised in the District Court, in the Court of Appeals, or in the petition for certiorari filed in this Court. The reasons that persuaded us to remand the *Boulden* case to the District Court apply with equal force here: "A further hearing directed to the issue might conceivably modify in some fashion the conclusion so strongly suggested by the record now before us. Further, it is not clear whether the petitioner has exhausted his state remedies with respect to this issue. Finally, in the event it turns out, as now appears, that relief from this death sentence must be ordered, a local federal court will be far better equipped than are we to frame an appropriate decree with due regard to available [Arkansas] . . . procedures." 394 U. S., at 484.[2]

Accordingly, the judgment of the Court of Appeals is vacated, and the case is remanded to the District Court.

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[2] During oral argument of this case reference was made to the following Arkansas statute:

"*Reduction of verdict.*—The court shall have power, in all cases of conviction, to reduce the extent or duration of the punishment assessed by a jury, if, in the opinion of the court, the conviction is proper, and the punishment assessed is greater than, under the circumstances of the case, ought to be inflicted, so that the punishment be not, in any case, reduced below the limit prescribed by law in such cases." Ark. Stat. Ann. § 43-2310 (1964 Repl. Vol.).

No effort was made by the petitioner to seek relief in the state courts under this statute; there is nothing in the record or otherwise reported to us to indicate that this remedy is not now available.

where the issue that has belatedly been brought to our attention may be fully considered. In the action we take today, we express no view whatever with respect to the two questions originally specified in our grant of certiorari.[4]

It is so ordered.

MR. JUSTICE MARSHALL took no part in the decision of this case.

[4] We have today granted certiorari in No. 486, Misc., *McGautha v. California*, and No. 709, Misc., *Crampton v. Ohio*, in which these two questions will be considered at an early date in the 1970 Term.

SUPREME COURT OF THE UNITED STATES

No. 13.—October Term, 1969

William L. Maxwell, Petitioner, *v.* O. E. Bishop, Superintendent, Arkansas State Penitentiary.	On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

[June 1, 1970]

Mr. Justice Black, dissenting.

Since I am still of the view that *Witherspoon* v. *Illinois*, 391 U. S. 510 (1968), was erroneously decided, I dissent from the opinion of the Court in this case.